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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL BANK OF TULSA, et al.,
Petitioner

v.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTION PRESENTED

Whether the mechanics' and materialmen's lien laws of the State of Oklahoma violate the Federal Constitution by depriving persons of property without due process of law.

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1980

MOBILE COMPONENTS, INC., a corporation
Petitioner

v.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased
Respondent

Consolidated With

FIRST NATIONAL BANK OF TULSA, et al.,
Petitioner

v.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners[1] request that a Writ of Certiorari issue to review the judgment of the Supreme Court of Oklahoma in this case.

[1] Petitioners are First National Bank of Tulsa; The Outrigger Inc.; Planned Residential Communities Construction Company of Oklahoma, Inc., and Hamilton Investment Trust, a voluntary business association of Massachusetts with Paul Stillman as a Trustee.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court is yet to be reported in the Pacific Digest. The opinion appears in The Oklahoma Bar Association Journal at 51 O.B.A.J. 2852 and is reprinted in Appendix A to this Petition. The Oklahoma Supreme Court revised and remanded the Order sustaining Motion for Summary Judgment of the District Court of Tulsa County, Oklahoma. The trial court's Order Sustaining Motion for Summary Judgment, which granted judgment to Petitioners herein, is reprinted in Appendix F.

JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on November 25, 1980. On February 18, 1981, the Oklahoma Supreme Court, upon Petitioners' timely filing of Petition for Rehearing, entered an order denying rehearing. (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).[2]

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[2] The opinion which the Petitioners seek to have reviewed is not a final judgment granting or denying relief. However, that opinion does finally determine an important right in issue; namely the validity of the Oklahoma mechanic's and materialmen's lien statutes when challenged as being repugnant to the Fourteenth Amendment to the Constitution of the United States.

The jurisdictional statute (28 USC 1257) permits the Court to review a judgment of the highest court in the state whenever a threshold federal issue has been decided by the state court and further proceedings cannot remove or otherwise affect this threshold federal issue. *New York v. Cathedral Academy* (1977) 434 US 125, 98 S. Ct. 340, 54 L.ed.2d 346. Further, this Court's jurisdiction to review the Oklahoma Supreme Court's decision is supported by cases such as *Cox Broadcasting*, in which Justice White stated that cases in which the federal issue, finally decided by the highest court in the state will survive and require decision regardless of the outcome of future state court proceedings, the decision is final for purposes of review to this Court. *Cox Broadcasting Corp. v. Cohn* (1975) 420 US 469, 95 S. Ct. 1029, 43 L.ed.2d 328. The reversal by this Court of the Oklahoma Supreme Court on the issue of the Constitutionality of Oklahoma's mechanic's and materialmen's lien laws

QUESTION PRESENTED

Whether the mechanics' and materialmen's lien laws of the State of Oklahoma violate the Federal Constitution by depriving persons of property without due process of law.

STATUTORY PROVISIONS INVOLVED

This case involves the Oklahoma Statutes which allow certain persons to file liens against real property for work performed thereon (Title 42, Oklahoma Statutes, 1971, Sections 141, 142, 143, 147, 172, 175, 177)[3] and the due process clause of the Fourteenth Amendment to the United States Constitution (U.S. Const. amend. XIV, §1). They are reprinted in Appendix D and Appendix E.

STATEMENT OF THE CASE

This petition arises from two related mechanic's lien foreclosure actions consolidated by the trial court. These suits involved lien claims against the record owners and the holders of mortgages on two tracts of land, one in Tulsa and one in Broken Arrow. The large number of parties to these consolidated actions tend to confuse the facts material to a consideration of the basic issue presented. However, these facts may be summarized as follows:

In July, 1974, Century Interiors, Inc. filed a mechanic's lien

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Footnote 2 continued . . .

would be preclusive of any further litigation in this cause of action. This issue is, " . . . too important to be denied review and too independent of the cause itself to require that appelate consideration be deferred until the whole case is adjudicated." *Local No. 438 Construction & General Laborers' Union v. Curry* (1963) 371 U.S. 542, 83 S.Ct. 531, 9 L.ed.2d 514.

[3] This action concerns only 42 O.S. 1971, §§141, et seq. Later amendments to those statutes are not in question here. For example, the Legislature amended the statute in 1977 to provide for notice of the claim to the landowner from the contractor and subcontractor. 42 O.S. Supp. §143.1.

in the amount of $17,115.37 against two separate properties in Tulsa County. The lien statement referred to work performed on land which was owned at the time by Lewis Avenue Investment Company. In September, 1974, Petitioner Outrigger acquired title to one of the above tracts, located in Tulsa. Simultaneously, Petitioner First National Bank took a mortgage covering the same property.

Planned Residential Communities Construction Company of Oklahoma, Inc., (PRCC) acquired title to the Broken Arrow tract by virtue of a certain Quit Claim Deed executed by the previous owner, Lewis Avenue Investment Company, in January, 1975. The Trustees of the Hamilton Investment Trust ("Hamilton") at that time (1975) held a first mortgage from Lewis Avenue Investment Company recorded in December 1972. PRCC subsequently executed a certain second mortgage to Hamilton in December, 1975. Thus, both PRCC, as the present owner of the subject property and Hamilton, as the holder of mortgage liens covering the subject property, were joined as party defendants in the two lien foreclosure actions brought relating to the two separate tracts in Broken Arrow and Tulsa.

PROCEEDINGS IN THE TRIAL COURT

On April 22, 1975, Respondent's decedent filed his Petition in Case C-75-1071 seeking to foreclose the lien which he claimed on the properties located in both Tulsa and Broken Arrow. Respondent obtained leave on May 20, 1975, to amend his original lien statement to include the correct legal description of both tracts of property upon which the lien was being claimed.

On March 30, 1976, the trial court ordered that the action commenced by Respondent's decedent be consolidated with Case No. C-75-1960, a lien foreclosure action filed on August 7, 1975, by another contractor on the Broken Arrow property,

Mobile Components, Inc. Thomas Layon, Sr., the originally named Plaintiff in Case No. C-75-1071, subsequently died, and his Executrix was substituted as Plaintiff (Respondent herein). On February 2, 1977, Petitioners Outrigger and First National Bank filed their Motion for Summary Judgment in Case No. C-75-1071 asking that Respondent's case be dismissed on grounds that the mechanics' and materialmen's lien statutes for Oklahoma are unconstitutional under the due process clause of the Fourteenth Amendment. The federal question sought to be reviewed herein was first raised at that stage in the proceedings.

The questionable constitutionality of Oklahoma's mechanic's lien statutes was extensively examined by Petitioners in their Brief supporting this Motion. Counsel for Petitioners summarized his constitutional examination of these statutes by stating:

> ". . . the conclusion is inescapable that the Oklahoma laws fail in every single aspect to pass constitutional muster. The lien laws of Oklahoma are constitutionally impermissible in the first instance because they fail to provide notice or opportunity to be heard *prior* to the time the lien is said to attach. Denial of due process permeates the entire statutory scheme in that nowhere in the proceedings are there any provisions for judicial participation or review of the facts and circumstances upon which the lien is predicated. The lien statement itself, furthermore, contains impermissible conclusory statements, rather than sufficient facts to support the claim. Nowhere in these lien laws is there any provision requiring a prompt post-seizure hearing on the probable validity of the contractor's or lienor's claim. Rather, the title to the property in question may be clouded for a year, or even longer if suit is eventually filed, thereby depriving the owner or his successor in interest of the full use and enjoyment of the property, namely the right to sell, alienate, or further mortgage the property.

The Motion for Summary Judgment was sustained on May 31, 1977, and the Court's Order was subsequently entered on July 18, 1977, the Honorable Judge Means ruling specifically that the mechanic's and materialmen's lien statutes of the State of Oklahoma are unconstitutional because they fail to provide due process of law. (Appendix F).

PROCEEDINGS IN THE OKLAHOMA SUPREME COURT

Respondent filed his Petition in Error in the Supreme Court of Oklahoma on June 28, 1977, urging the Court to find the state's mechanic's lien laws constitutional (Appendix G). Respondent argued that "clear logic and the weight of current legal authority show Oklahoma's mechanic's lien statutes are not unconstitutional." In support of this argument Respondent relied primarily on a series of state and federal district court decisions which have upheld the validity of their respective state's mechanic's lien statutes. Emphasis was placed on the case of *Spielman-Fond, Inc. vs. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz., 1973), in which the court upheld the Arizona statute under a constitutional due process challenge, reasoning that the filing of a mechanic's lien does not amount to a taking of a significant property interest.

Petitioners filed their Answer Brief on December 27, 1977, in which they described the procedure for (and the impact of) filing a mechanic's or materialmen's lien in Oklahoma, pointing out that the lien laws fail to provide for any type of timely notice or hearing on the probable merits of the claim against the owner's property, or for any judicial participation at an early stage of the proceedings, or for any type of bond or security to protect the owner against a wrongful taking. Petitioner distinguished *Spielman-Fond* and the other cases cited by the Respondent by noting that the Oklahoma statutes contain fewer

due process protections for the property owner than any of those states in which the lien laws had been upheld. Petitioner compared the case at bar to *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); *Mitchell v. W. T. Grant Company*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), in which this Court enunciated what is constitutionally permissible under the due process clause before a debtor may be subjected to prejudgment garnishment or replevin. In making this comparison, Petitioner advanced the argument that the due process test which the Supreme Court applied to garnishment and replevin statutes cannot be disregarded by the states in their formulation of mechanic's and materialmen's lien statutes. The same test should apply because in all of these cases the property owner is deprived of a substantial property interest.

Finally, the Petitioner urged the Oklahoma Court to renounce the position, heretofore taken by a few jurisdictions, that the effect of a mechanic's lien on property is "de minimis." Rather, the Oklahoma Justices were encouraged to adopt the position taken by the Supreme Courts of Maryland and Connecticut—that a mechanic's lien is a prejudgment creditor remedy which *does* deprive the owner of a significant property interest. *Barry Properties, Inc. v. Flick Brothers Roofing Co.*, 353 A.2d 222 (Md. 1976); *Roundhouse Construction Corp. v. Telesco Masons Supplies Company, Inc.*, 362 A.2d 778 (Conn. 1975). Petitioner quoted directly from *Barry Properties*:

> "In short, the Maryland mechanic's lien law permits an owner to be deprived of a significant property interest without notice or a prior hearing, and thus is unconstitutional unless it provides protections such as those dis-

> cussed in *Mitchell* and *North Georgia Finishing* or it is deemed to be within the "extraordinary circumstances" exception. *Barry Properties, Inc.*, supra, 353 A.2d 231-232.

On November 25, 1980, the Supreme Court of Oklahoma, by an 8-1 decision, upheld the constitutionality of Oklahoma's mechanic's and materialmen's lien laws, thus reversing the Order of the trial court.

In its majority opinion, the Oklahoma Court stated that the filing of a mechanic's lien against real estate does not amount to a taking of a significant property interest. The Court reasoned that due process scrutiny does not apply to mechanic's lien statutes because the filing of such a lien is not an actual physical taking of the property. Equating the notice function of a mechanic's lien with that of a notice of lis pendens, the Court held that, "On balance, the notice function, as well as administrative necessity, outweighs the minimal interference to property resulting from mere filing of the claim." Acknowledging that some jurisdictions have held that the filing of the lien statement constitutes a significant taking of a property interest, the majority declared that "we cannot do so." On the contrary ". . . the filing of a lien statement under our mechanic's and materialmen's lien statutes is only a *de minimis* interference with the use and enjoyment of the property involved."

The dissenting opinion of Justice Hodges represents a total endorsement of the arguments put forth by the Petitioners in their Answer Brief (Appendix B). The dissatisfaction of Justice Hodges with the majority decision is immediately apparent. His opinion even contains a parody of the majority's holding:

> "While some courts have elected to adhere to the theory that the filing of a mechanics' lien is a *de minimis* taking of property not worthy of due process protection, I can-

> not do so. I am persuaded by the rationale adopted by other jurisdictions which holds that the imposition of a mechanics' lien without any judicial assessment of its merits constitutes a significant taking of property and is violative of due process. (Footnotes omitted.)

The dissent stressed the practical consequences of lien claims which may be "frivolous, malicious, or fraudulent." In the words of Justice Hodges:

> "The greatest advantage in owning land is often not the actual possession of the property, but the collateral benefits which are derived from ownership. These include the right to alienate, encumber, mortgage, lease, and acquire equity. A mechanics' lien has a drastic effect on these privileges. (Footnote omitted.)

Petitioners filed a timely petition for rehearing. Among other things, the petition stressed the fact that the majority followed the so-called *de minimis* holding of *Spielman-Fond* and its successor cases without even taking note of the obvious procedural deficiencies of Oklahoma's lien statutes when compared to the lien statutes of those other jurisdictions. Petitioners pointed out that every state mechanic's lien statute which has been found constitutional contained safeguards for the property owner which Oklahoma's statutes lack. And, concerning the majority's opinion that a mechanic's lien statement is "much the same as the lis pendens notice," Petitioners discussed the differences between the two legal concepts, specifically on the aspect of due process. While the owner of property under a mechanic's lien (in Oklahoma) is either subjected to a one-year cloud on his title or must initiate a civil action himself to remove the cloud, the owner of property under lis pendens receives actual and almost immediate notice of the claim against his property and may avail himself of all the procedures and remedies available to a defendant in a civil action. Under lis pendens,

therefore, the property owner does receive the guarantees of due process in the form of actual and prompt notice of the claim and a prompt hearing on the probable merits of the claim. Furthermore, the mechanic's or materialmen's lien attaches as of the date the first labor is performed or first material furnished on the property, while the lis pendens claimant obtains priority over other creditors only after having filed suit.

The petition for rehearing was denied by the Oklahoma Supreme Court by Order entered on February 18, 1981.

REASONS FOR GRANTING THE WRIT

In this case, the Supreme Court of Oklahoma, in a divided opinion, reversing the Order of the trial court, has determined that the filing of a mechanic's or materialmen's lien statement, under Oklahoma's lien statutes, does not amount to a taking of significant property interest. In upholding the constitutionality of this state's mechanic's lien laws, the Oklahoma Court has announced a far-reaching rule which affects every owner and potential owner, of real estate in Oklahoma, as well as the rest of the nation. The Oklahoma Supreme Court has contributed to the growing breach between those states which have upheld their mechanic's lien laws and those states which have struck them down as depriving persons of their property without due process of law. The gravity of this decision is all the more evident because the statutes upheld by the Oklahoma Court contain even fewer due process protections for the owner of property than any statutes heretofore reviewed by other state or federal courts. There are few decisions in recent years with more significance to owners of property, purchases of property, lenders, and the construction industry.

As the Court below indicated, the only issue in this case is the constitutionality of 42 O.S. 1971, §§141, et seq. We submit

that the decision below is unsupported by constitutional law. The statutes in question offend and violate standards of due process established by this Court. The most glaring defect in 42. O.S. 1971, §§141, et seq. is the failure to provide for notice or opportunity to be heard *prior* to the time the lien attaches. The lien is filed with the Court Clerk of the County in which the prooerty is situated, without the slightest hint of judicial participation. The lien statement must contain only the names of the owner, contractor and claimant, the amount claimed, items furnished, and a description of the property subject to the lien. There is no prompt post-seizure hearing on the validity of the contractor's claim. The lien claimant may continue to cloud the title for a year following the filing of his statement. The property owner may never have notice that any lien has been filed against his property because the contractor is not compelled to furnish any notice to him prior to, or even after, filing his lien. The lien claimant does does not have to post any type of bond or security which would afford protection against any damages due to wrongful attachment.

Finally, the Oklahoma statutes provide that the lien may be discharged by the *property owner* by filing with the Court Clerk the amount the lien claimant alleges to be owing, in cash, accompanied by a bond to protect the *claimant* against attorney's fees, costs and interest should the claimant prevail at trial. Such a scheme, whereby the *debtor* is required to post a bond for the protection of the *creditor,* but the creditor has no reciprocal requirement to secure the debtor against any damages, epitomizes the lack of due process pervasive in the Oklahoma lien laws.

The Oklahoma Court has totally ignored the numerous deficiencies in the Oklahoma law. When faced with judicial prece-

dent closely aligned to the issues and laws facing it,[4] the majority chose to "agree" instead with "the majority of jurisdictions which have considered the issue, that the filing of the lien statement is a *de minimis* taking to which due process protection does not attach."[5] By blindly following the example of other states – states whose lien statutes do not contain the above constitutional deficiencies – the Oklahoma Court has rendered even more indistinct the gray area into which a prejudgment attachment procedure may intrude without satisfying the well-recognized standards of due process.

This case raises a significant constitutional question which

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[4] Jurisdictions declaring their mechanics' lien statutes unconstitutional on the grounds that they are violative of due process include: *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc., 362 A.2d 778, 168 Conn. 371, vacated 423 U.S. 809, on remand 365 A.2d 393, 170 Conn. 155, cert. den. 429 U.S. 889 (1976) (Conn. 1974); Barry Properties, Inc. v. Fisk Bros. Roofing Co., 353 A.2d 222, 277 Md. 15 (Md. 1976).* Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the grounds that they contain procedural safeguards sufficient to satisfy due process include:

Connolly Development, Inc. v. Superior Court of Merced County, 553 P. 2d 637, 132 Cal. Rptr. 477, 17 C.3d 803, appeal dismissed 97 S.Ct. 778 (Cal. 1976); *Ruocco v. Brinker,* 380 F.Supp. 432 (Fla. 1974).

[5] Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the ground that the filing of a mechanic's lien does not constitute the taking of a significant property interest include: *Spielman-Fond v. Hanson's Inc.,* 379 F.Supp. 997, affirmed 417 U.S. 901 (Ariz. 1973); *Nelson-American Developers, Ltd. v. Enco Engineering Corp.,* 337 So.2d 729, (Ala. 1976); *Banker's Trust Co. v. El Paso Pre-Cast Co.,* 560 P.2d 457 (Colo. 1977); *Tucker Door & Trim Corp. v. 15th St. Co.,* 221 S.E.2d 443, 235 Ga. 727 (Ga. 1975); *Keith Young & Sons Const. Co. v. Victor Senior Citizens Housing, Inc.,* 262 N.W.2d 554 (Iowa 1978); *Carl A. Morse, Inc. v. Rentar Industries Development Corp.,* 391 N.Y.S.2d 425 (N.Y.1975); *B&P Development Co. v. Walker,* 420 F.Supp. 704 (Penn. 1976); *Cook v.Carlson,* 364 F.Supp. 24 (S.Dak. 1973); *In re Thomas A. Cary, Inc.,* 412 F.Supp. 667 (Va. 1976); *Home Bldg. Corp. v. The Ventura Corp., and Housing Authority of the City of Nevada, Missouri,* 568 S.W.2d 799 (Mo. 1978); *Silverman v. Gossett,* 553 S.W.2d 581 (Tenn. 1977); *(So. Cent. Dist. Pentecostal Church of God of America, Inc. v. Bruce-Rogers Co., Ark.*

has received conflicting treatment by the highest courts of several states. Neither property owners, lenders, nor even the courts in those states *yet* to wrestle with this issue can live with a system in which the mechanic's lien laws of those states may or may not be constitutional – depending upon whether dues process scrutiny is applied. Review by this Court is necessary to correct a statutory scheme – sanctioned by some courts, stricken down by other courts, and yet to be determined by a third group of courts – which permits varying degrees of prejudgment seizure of property with no guarantees of due process.

I.

The Decision in This Case Conflicts With Decisions of Other State Courts of Last Resort.

It is well settled that before the issue can be reached of whether a mechanic's lien statute violates due process, two threshold questions must be resolved: (1) whether the statutory scheme involves "state action,"[7] and, (2) whether the property owner is being deprived of a "significant property interest" by virtue of the attachment of the lien.

Of the sixteen reported cases in which the courts have addressed the issue of the constitutionality of state mechanic's lien statutes, none has held that state action was not involved. On the other hand, the same courts have not agreed on the second threshold question. Of the sixteen reported cases, four have stated clearly that the imposition of a mechanic's or materialmen's lien constitutes a taking of a significant property interest[7] (one of these four cases is a federal district court decision[8]).

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[6] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477 (1974).

[7] See footnote 5.

[8] *Ruocco v. Brinker*, 380 F. Supp. 432 (Fla. 1974).

Twelve courts have ruled that the filing of a mechanic's lien does not constitute the taking of a significant property interest (four of these twelve cases are from federal district courts[9]). Consequently, three state courts of last resort have held that a mechanic's lien does involve deprivation of a significant property interest of the owner, while eight state courts have reached the opposite result.

Petitioners submit that it cannot be seriously disputed that the imposition of a mechanic's or materialmen's lien constitutes a taking of a significant property interest. The highest court of Maryland had little difficulty concluding that the attachment of such a lien is a significant taking of property:

> "Under . . . the Maryland statute, there is a "subsisting lien" as soon as materials are supplied or work is performed, . . . which constitutes a cloud on the property owner's title. Although possession will not be wrested from the owner until a purchaser acquires title through a foreclosure sale and the owner can still legally alienate or further encumber the property until that time, in reality, since he no longer has unfettered title, not only will it be extremely difficult for him to do so but additionally his equity will be diminished to the extent of the lien. *Barry Properties, Inc. v. Flick Bros. Roofing Co.*, 227 Md. 15, 353 A.2d 222, 228 (1976).

In footnote 6 the Maryland court noted that "when timely filed, the claimed lien additionally becomes an encumbrance of record." 353 A.2d at 228 n.6.

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[9] *Spielman-Fond v. Hanson's Inc.*, 379 F. Supp. 997, affirmed 417 U.S. 901 (Ariz. 1973)
B & P Development Co. v. Walker, 420 F.Supp. 704 (Penn. 1976)
Cook v. Carlson, 364 F.Supp. 24 (S.Dak. 1973)
In re Thomas A. Cary, Inc., 412 F.Supp. 667 (Va. 1976)

The holding in *Barry* and the reasons upon which it is based apply with full force to Oklahoma's lien laws and the case at bar. The critical elements which formed the basis for the court's finding of a significant property interest are likewise present in Oklahoma. The statutes under constitutional challenge in Maryland and Oklahoma were nearly indentical. Yet the highest courts of these two states reached opposite results.

Similarly, the California Supreme Court concluded in *Connolly Development Inc. v. Supreme Court of Merced County* that the imposition of a mechanic's lien deprives the landowner of a significant property interest and accordingly constitutes a "taking" within the meaning of the due process clause. 553 P.2d at 664. The court stated:

> But although the imposition of a mechanics' lien does not deprive the owner of the interim use of his property, it may severely hamper his ability to sell or encumber that property. Subsequent purchasers whose title will be subject to the lien may be unwilling to purchase a lawsuit with the land; lenders may refuse a loan on property subject to lien claims; the owner may in some cases be forced to pay a possible invalid lien in order to clear title to his property in time for a pending transaction to be consummated.
>
> *A deprivation need not reach the magnitude of a physical seizure of property in order to fall within the compass of the due process clause.* 553 P.2d at 643 (footnote omitted, emphasis added).

The Connecticut Supreme Court reached the same conclusion in *Roundhouse Construction Corp. v. Telesco Masons Supply Co.*, 168 Conn. 371, 362 A. 2d 778, 784, *vacated and remanded for determination whether decision rests on state or federal constitutional grounds*, 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed. 2d 29 (1975), *reaffirmed on both state and federal*

grounds, 170 Conn. 155, 365 A.2d 393, *cert. denied,* 97 S.Ct. 246 (1976).

The reasoning in *Connolly* is applicable to Oklahoma law as well since materialmen's liens attach to and follow the property and are enforceable against any subsequent purchaser or transferee. 42 O.S. §141; *Metropolitan Water Co. v. Hild,* 415 P.2d 970, 971 (Okla. 1966). Thus, as a *practical matter,* the effect of such a lien is to render an owner's property inalienable. Furthermore, as the court in *Barry* so astutely recognized, not only will, in reality, the owner's ability to alienate be almost nonexistent, but additionally his equity will be diminished to the extent of the lien.

The highest courts in eight states have reviewed the hardships imposed upon the property owner by the attachment of a mechanic's lien and have concluded that there is no taking of a significant property interest. Curiously, these state courts have relied upon the rationales expounded by each other in reaching this conclusion – just as the Oklahoma court has done. These courts have committed three serious errors in relying upon the so-called "de minimis" argument. They have ignored the practical consequences resulting from the filing of the lien statement. They have failed to note the procedural differences between the various statutes in the states they rely upon as precedent. And they refuse to apply the precedent of landmark decisions handed down by this Court involving the effect of the due process clause upon prejudgment creditor remedies.

With regard to the first major error, the majority of the court below minimized the consequences of the mechanic's lien by simply acknowledging the arguments put forth by Petitioners herein[10] and then proceeding to borrow the rationale of the

[10] At page 5 of the majority opinion, the Oklahoma Court paraphrased the arguments of Petitioners:

federal district court of Arizona in *Spielman-Fond.* The Oklahoma court quoted directly from *Spielman-Fond* at page 8 of its opinion:

> "Here, a lien is filed against the property and clouds title. It cannot be denied that the effect of such lien may make it difficult to alienate the property. If the plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be more difficult to find, *once he is found* there is nothing to prevent plaintiffs from making the sale to him." (379 F.Supp. at 999).

Justice Hodges, in his dissent to the court below, has more realistically assessed the effect of filing such a lien. Compare the language of *Spielman-Fond* with the description by Justice Hodges of the drastic effect of a mechanic's lien on the right to alienate, encumber, mortgage, lease, and acquire equity in property:

> A mechanics' lien has a drastic effect on these privileges. It clouds the title to the property, making it extremely difficult or even impossible to sell or mortgage the land. Even if a willing buyer is found, the owner often has to accept much less than the actual value of the property, and may, in some instances, be forced to pay an invalid claim in order to clear title to his property in time for a pending transaction to be consummated. The fact that some improvements have been made on the land is little comfort to the owner whose property has suffered a sub-

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Footnote 10 continued . . .

A lien, they argue, (1) clouds the title, and (2) restricts the alienation of the land, or at least reduces the market value; (3) the filing of the lien statement constitutes a taking; and (4) the provisions of the Oklahoma Mechanics' and Materialmen's lien statutes do not have the sufficient procedural safeguards required by the above cases, and are therefore unconstitutional.

> stantial diminution in value, especially when the lien is invalid or was filed because the owner has refused to pay for improvements which have been done in a shoddy or unworkmanlike manner. (Page 9 of Dissent.)

The Oklahoma Court has chosen to blindly follow the de minimus holding in *Spielman-Fond* without even taking note of the obvious procedural differences between the Arizona lien statute and Oklahoma's lien statute. For example, suit had to be brought within six months of the filing of the lien in Arizona, while the lien claimant in Oklahoma can wait one year before he must bring suit to foreclose his lien. In addition, the time periods for filing a lien for contractors and subcontractors were 90 and 60 days respectively, while Oklahoma permits the filing within 120 and 90 days respectively. The Arizona statutes which were held constitutional provided for notice to the owner if he was in the county. The Oklahoma statute in effect at the time of this litigation did not provide for any notice to the property owner by the contractor.

The differences between the Oklahoma law and other state statutes prompted Justice Hodges to declare, "Almost all of the state statutes which have been found constitutional contain safeguards that Oklahoma's laws lack." Further investigation by Petitioners has disclosed that *every* state statute which has been found constitutional contains due process protections lacking in the Oklahoma law.[11]

II.

The Decision in the Case Below is in Conflict with Applicable Decisions of this Court on the Important Question of What is Constitutionally Permissible Under

[11] Proposition VII of the Petition for Rehearing contains a discussion of the statutes which have been held constitutional by other jurisdictions.

the Due Process Clause for Prejudgment Seizure of Debtor's Property.

While there is no United States Supreme Court decision enunciating the due process requirements with respect to mechanic's liens, we submit that the Oklahoma court has erred in failing to follow the precedent this Court has established in four landmark decisions involving prejudgment creditor remedies.

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) this Court struck down as unconstitutional a Wisconsin prejudgment garnishment statute which permitted a creditor to freeze the wages of an alleged debtor without prior notice or hearing. The summons was issued by the court clerk, at the request of the creditor's attorney, without any judicial participation. This Court held that absent notice and a prior hearing the prejudgment garnishment procedure violated the fundamental principles of due process.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) the Supreme Court held that the prejudgment replevin statutes of Florida and Pennsylvania violated due process. The statutes under consideration authorized the issuance of writs ordering state agents to seize a person's possessions simply upon the ex parte application of any person claiming a right in the property conditioned upon the posting of a security bond. The Court reiterated that, except in unusual situations, notice and opportunity for an adversary-type hearing must be provided before an alleged debtor can be deprived of his property.

The limits of due process were refined in *Mitchell v. W T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed 2d 406 (1974). This Court upheld a Louisiana statute allowing, without prior

notice or an opportunity for a hearing, prejudgment sequestration of personal property to enforce the vendor's lien of a creditor who made an installment sale of goods. However, to obtain the writ, the creditor had to specify in an affidavit the facts, not conclusions, supporting his claim. The affidavit was examined by a judge before the writ was issued. The *creditor* was required to file a bond which would compensate the debtor if the sequestration was unjustified. The debtor was provided a prompt post-seizure hearing, and if the creditor could not substantiate his claim, the debtor recovered his property, attorney's fees and any damages sustained. With four Justices dissenting, the Court concluded that the judicial participation in these proceedings, and the protections afforded creditor and debtor, sufficiently satisfied the requirements of due process.

The Supreme Court's most recent decision dealing with prejudgment garnishment remedies and due process is *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). The Court overturned as contrary to due process, a Georgia statute authorizing prejudgment garnishment of a commercial bank account. To garnish the account, the claimant had to file an affidavit with the court clerk, stating the amount claimed, and post a bond equal to twice that amount. The Court held this statute unconstitutional because it provided no prior notice or hearing, nor did it satisfy the standards set in *Mitchell,* requiring judicial participation in the proceedings, absent notice and hearing.

These four United States Supreme Court cases have established clear standards of due process for prejudgment creditor remedies. A statutory prejudgment creditor remedy which even temporarily deprives a debtor of a significant property interest without notice and an opportunity for a prior hearing violates due process. If prior notice and hearing are not provided, *Mit-*

chell requires that if an ex parte order is issued, there must be judicial participation in its issuance; the creditor must produce a sworn affidavit alleging specific facts; there must be a prompt post-seizure hearing; and the *creditor* must post a bond to protect the debtor against any damages and attorney fees resulting from a wrongful taking of his property.

Petitioners assert that even a cursory examination of 42 O.S. 1971, §§141 et seq. will show that Oklahoma's mechanic's lien statutes unequivocally violate those well recognized standards of due process.

III

The Issue in this Case Involves an Important Question of Federal Law Which Has Not Been but Should be Settled by this Court.

Justice Hodges points out in his dissent to the decision below that, "Even though the United States Supreme Court has had an opportunity to consider the constitutionality of statutorily created liens, it has failed to do so, and thus no clear precedent exists."[14] A large number of the cases relied upon by the Oklahoma Court cite the decision by the U.S. District Court of Arizona in *Spielman-Fond* for the proposition that mechanic's and materialmen's liens do not constitute the taking of a significant property interest. On appeal to the United States Supreme Court, *Spielman-Fond* was summarily affirmed without any discussion. This has created a great amount of confusion because many courts have taken this to be a final determination of the constitutionality of *all* mechanic's lien laws. Furthermore, the same courts have blindly accepted the rationale of *Spielman-Fond* that a mechanic's lien is only a de minimis interference with the ownership of real property.

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[12] Justice Hodges dissenting opinion at page 8.

Even the majority opinion below, however, acknowledged that a summary affirmance by the United States Supreme Court, without opinion, has limited precedential value. Chief Justice Burger stated in *Fusari v. Steinberg,* 419 U.S. 379, 391, 95, S.Ct. 533, 541, 42 L.Ed.2d 521, 530 (1975):

> "When we summarily affirm without opinion the judgment of a three-judge District Court, we affirm the judgment *but not necessarily the reasoning by which it was reached.* An unexplicated summary affirmance settles the issues *for the parties,* and *is not to be read as a renunciation* by this Court of doctrines previously announced in our opinions after full argument." (Emphasis added)

Applying these precepts, the court in *Brookhollow Associates v. J.E. Green,* 389 F. Supp. 1322 (D. Conn. 1975) observed in a footnote:

> "The lower court's reasoning may not have been the basis of the Supreme Court summary affirmance, as Chief Justice Burger warned in his recent concurring opinion in *Fusari v. Steinberg, . . . The Court may have reasoned instead that there was interference with a significant property interest but that on balance the state's procedures provided sufficient due process protection."* (Emphasis added) 389 F. Supp. 1327 (n. 7)

Petitioners submit that the summary affirmance of *Spielman-Fond* was *not* a proclamation that the mechanic's lien statutes of all other states do not amount to a taking of a significant property interest. Indeed, there are serious differences between the lien laws of Arizona and Oklahoma. The precedential value which the highest courts of eight states have attached to the summary affirmance in *Spielman-Fond* is even more doubtful when one considers a subsequent statement by this Court issued eight months after the affirmance of *Spielman-Fond*:

> "We are no more inclined now than we have been in

> the past to distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing, Inc. v. Di-Chem,* 419 US 601, 608 (1975).

The acceptance by the Oklahoma Court of the so called "de minimis" rationale of *Spielman-Fond* is representative of the abundance of dubious constitutional assumptions accepted by the highest courts of several states. The Oklahoma Court, for example, cited the Supreme Court of Missouri in pointing out that the owner of property to which a mechanic's lien is attached still retains *physical possession* of the property.[15] We are unaware of any statement by the United States Supreme Court that property must be physically seized in order to subject the challenged action to due process scrutiny.

CONCLUSION

Petitioners submit that the decision below is in error. To hold that mechanic's and materialmen's liens do not amount to a "significant property interest," or otherwise have only a "de minimis" effect on the property owner's right to deal freely with his property, is to ignore fundamental practical considerations, and indeed the realities of the setting in which real estate transactions occur. When exposing Oklahoma's mechanic's lien laws to the due process test announced by this Court, and following the lead of the State Supreme Courts of Maryland and Connecticut, the conclusion is inescapable that the Oklahoma laws fail to pass constitutional muster.

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[13] The Oklahoma Supreme Court majority cites with approval at page 8 of its opinion the economic effect of a mechanic's lien as described in *Home Building Corp. v. The Ventura Corp., et al,* 368 S.W. 2d 799 (Mo. 1978):

> ". . .but that does not deprive the owner of a significant property interest. The possession and use of the property is retained and the owner may sell, lease or encumber . . . ."

The rule accepted by the Oklahoma Court (and those courts in agreement) that the due process clause of the Fourteenth Amendment does not apply to mechanic's and materialmen's lien statutes effectively jeopardizes the effectiveness of the due process clause. The highest courts of nine states have now ruled that the well established standards of due process, announced by this Court in *Sniadach, Fuentes, Mitchell,* and *North Georgia Finishing,* have absolutely no application to mechanic's lien laws – no matter how those laws might favor the rights of the contractor over the rights of the property owner. If this decision is allowed to stand, the legislatures and courts of those states yet to face this issue will have no due process standards by which to measure their statutes. Sixteen state and federal courts have been called upon to rule on the constitutionality of the mechanic's lien laws in their respective jurisdictions. With no effective guidelines from this Court, we foresee no reason why the number of constitutional challenges will not continue to grow. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

FOR OFFICIAL PUBLICATION

No. 51,141

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
State of Oklahoma
NOV 25, 1980
ROSS N. LILLARD, JR.
Clerk

MOBILE COMPONENTS, INC., a corporation;
PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC., formerly PLANNED RESIDENTIAL COMMUNITIES OF OKLAHOMA, a corp.;
HAMILTON INVESTMENT TRUST, a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER dba LASATER ELECTRIC;
D. McGLUMPHY dba MAC'S ELECTRIC CO.;
RAYMOND P. SEMONES dba TWILITES MFG. CO.;
TOM B. CHILDERS dba TOM B. CHILDERS GRADING & ESCAVATING, INC.;
MURPHY PAINT & DRYWALL, INC.;

MILLER CONSTRUCTION CO. OF TULSA, INC.;
R.A. YOUNG & SON, INC.,
a foreign corporation;
BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA;
IRRIGATION CONSTRUCTION CO.;
REX INVESTMENT CORPORATION;
RAMON L. KING;
PATRICIA A. KING;
PLYWOOD OF TULSA, a division of International Forest Products Corporation;
BANK OF OKLAHOMA formerly NATIONAL BANK OF TULSA;
UNITED BANK;
TULSA CONTAINER, INC.;
UNIVERSAL CONTRACTING CORPORATION, a corporation;
JACK R. SOWLES and JAMES C. METZKER, Individually and dba LEWIS AVENUE INVESTMENT COMPANY
MIDLAND MORTGAGE CO., INC.;
EVANS AND MITCHELL, a Georgia corporation;
UNITED STATES OF AMERICA;
GERALD W. BLAKELEY, JR., et al., Trustees of CABOT, CABOT, AND FORBES LAND TRUST, Massachusetts Business Trust;
AMULCO ASPHALT CO.;
JERRY WENDLAND;
CHARLES WENDLAND;
GENERAL ELECTRIC COMPANY;
SOUTHWEST MANUFACTURING CO.;

JOHN F. CANTRELL, Treasurer of Tulsa County, Oklahoma;
PAUL F. HELMUTH HALL & DOOR;
GREENHILL CONSTRUCTION CO.;
DUOSKIN, INC.;
SIZEMORE, SACK & SIZEMORE;
and ANSLIE PERRAULT

Appellees

vs.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased

Appellant

Consolidated With

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased

Appellant

vs.

FIRST NATIONAL BANK OF TULSA;
THE OUTRIGGER, INC.;
UNIVERSAL CONTRACTING CORPORATION, a foreign corp.;
MARTI STRATTON dba MARTI'S COMMERCIAL INTERIORS;
LEWIS AVENUE INVESTMENT COMPANY, an Oklahoma general partnership with Jack R. Sowles and James M. Metzker;
PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC.;

HAMILTON INVESTMENT TRUST,
a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER dba LASATER ELECTRIC;
D. McGLUMPHY dba MAC'S ELECTRIC CO.;
CONCRETE SPECIALTIES OF TULSA, INC.;
RAYMOND P. SEMONES dba TRILITES MANUFACTURING CO.;
TOM B. CHILDERS;
MURPHY PAINT & DRYWALL, INC.;
PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY;
MILLER CONSTRUCTION CO. OF TULSA, INC.;
TURNER ROOFING AND SHEET METAL, INC.;
MOBILE COMPONENTS CORPORATION,
a foreign corporation;
THE BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA;
DUOSKIN, INC.;
and SIZEMORE, SACK & SIZEMORE;

Appellees

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA, HONORABLE WILLIAM W. MEANS, JUDGE

Appeal from order sustaining motion for summary judgment declaring the Oklahoma Mechanics' and Materialmen's Lien Statute, 42 O.S. 1971, § 141, et seq., unconstitutional. Judgment of the trial court reversed and cause remanded.

REVERSED AND REMANDED

Joseph A. McCormick and Robert L. Roark, of Hall, Sublett & McCormick, Tulsa, Oklahoma	For Appelles, First National Bank of Tulsa & The Outrigger, Inc.
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Wesley R. Thompson, Sapulpa, Oklahoma	For Appellant.
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David Noss, of Rheam and Noss, Tulsa, Oklahoma	For Amicus Curiae, Wilson Fire Protection, Inc.
Paul E. Garrison, of Garrison, Pigman, Comstock and Thurston, Tulsa, Oklahoma	For Amicus Curiae, Auxier-Scott Supply, Inc., Palmer Plumbing, Heating & Air Conditioning Company, Inc., Benjamin F. Mott dba Mott Roofing & Sheet Metal Co.

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For Amicus Curiae,
Fred J. and Mary Ann Zalokar.

SIMMS, J:

This appeal concerns two lien foreclosure actions consolidated by the trial court. In 1973, Lewis Avenue Investment Company, as landowner, contracted to have a total of 975 apartment units constructed on two tracts of land, one in Tulsa and one in Broken Arrow. The carpeting for the units on both tracts was sub-contracted to Century Interiors, Inc. On July 17, 1974, Century filed a materialmen's lien statement in the amount of $17,115.37. The lien statement incorrectly described the Tulsa property for which the carpeting was furnished, but correctly described the property in Broken Arrow.

Appellant, as the assignee of these lien claims, sued below for foreclosure. Appellee Planned Residential Community Construction Company (PRCCC) bought the Broken Arrow property in January, 1975, with notice of the lien claim. Appellee Outrigger bought the Tulsa property in September, 1974, at which time, because of the incorrect description on the statement, it had no notice of the lien claim. Appellant, after the commencement of this action, was allowed to amend the lien statement to correctly describe the Tulsa property.

Appellees' motion for summary judgment was sustained at the pretrial conference. The trial judge ruled that the Oklahoma Mechanics' and Materialmen's Lien laws, 42 O.S. 1971, §§ 141,

et seq., were unconstitutional as a deprivation of property without due process of law. The constitutionality of these statutes is the only issue on appeal.[1]

We do not now determine if the trial court erred by allowing the description amendment to the lien statement, or by allowing one lien statement to suffice for two noncontigious tracts of land.

42 O.S.1971, §§ 141, et seq., provide the statutory scheme through which a mechanic or materialman may claim a lien on real estate. A general contractor must file a lien statement within four months after the date upon which the last labor is performed, or materials last furnished, in the office of the clerk of the county where the land is located. The statement need only provide: the amount claimed and the items thereof as nearly as practicable; the names of the owner(s), the contractor, and the claimant; and a legal description of the property, all verified by affidavit. 42 O.S.1971, § 142.

The relevant provisions for subcontractors are the same, except that the lien statement must be filed within ninety days from the date of the last work performed or material furnished, and notice of the claim must be served to the owner. 42 O.S. 1971, § 143.[2] The lien statement constitutes constructive notice of the claim to all purchasers subsequent to the date of the furnishing of the first material or performance of the first labor. 42 O.S.1971, § 141.

The claimant has one year to commence suit to enforce the lien. 42 O.S.1971, § 172. If no action is commenced within one

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[1] This action concerns only 42 O.S.1971, §§ 141, et seq., the later amendments to those statutes, 42 O.S.Supp.1979, §§ 141, et seq., are not in question here.

[2] The Legislature amended the statue in 1977 to provide for notice of the claim to the landowner from the contractor as well as the subcontractor. 42 O.S.Supp. § 143.1.

year, lien is canceled by limitation of law. 42 O.S.1971, §177.[3]

The landowner may bring an action to discharge the lien at any time. 42 O.S.1971, § 177. He can also discharge the lien by posting a cash bond in a suitable amount. 42 O.S.1971, § 147. He has no other remedy. There is no provision that the claimant must post bond to indemnify the landowner for costs he might incur in clearing title to his property.

Appellant makes no claim that the liens it asserts were not the result of state action, but only that no significant property interest is deprived by the mere filing of the lien statement.

Appellees' constitutional attack on the Oklahoma lien statutes is based primarily on four recent decisions by the United States Supreme Court concerning the requirements of due process where a state statute gives a creditor prejudgment relief.

In *Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed 2d 349 (1969),* a Wisconsin statute allowing a creditor to freeze the wages of an alleged debtor was held to be unconstitutional. The Court ruled that before the debtor could be deprived, even temporarily, of his wages, due process of law required that he be given notice and an opportunity to be heard.

Three years later, in *Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed 2d 349 (1972),* the Court invalidated prejudgment replevin statutes of Florida and Pennsylvania, which allowed property to be seized by an ex parte application of one claiming a right in the property. The Court held that due process required that, except in unusual circumstances, the debtor must be given notice and an opportunity to be heard before he

[3] Under our Title Examination Standards, 16 O.S.1971, Ch. 1, App., St.14.1, unreleased liens may be disregarded where foreclosure has not been filed within the statutory time, and the Clerk requested to release same pursuant to 42 O.S. § 177.

can be deprived, even temporarily, of any significant property interest.

In *Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed 2d 406 (1974),* a Louisiana statute allowing sequestration of property sold under an installment sale was upheld. The Court distinguished *Fuentes,* by saying that in this case the seizure was necessary to protect the rights of the seller in the collateral, as he had a valid vendor's lien. The statute did not provide for notice and a hearing, but did have other procedural safeguards that the Court found to be a sufficient accomodation of the respective interests involved. The statute required: an affidavit of facts; review by a judge; a bond to be posted by the creditor; and a prompt post seizure hearing.

Most recently in *North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601, 96 S.Ct. 719, 42 L.Ed 2d 751 (1975),* the Court overturned a Georgia statute allowing the freezing of a commercial bank account. The statute required an affidavit to be filed with the court clerk, and a bond posted for twice the amount claimed. The Court held this statute unconstitutional because it provided for no prior notice and opportunity to be heard, nor any judicial participation in the proceeding before garnishing the account.

These cases enunciate the current due process standards required for prejudgment garnishment and replevin statutes. In the absence of extraordinary circumstances, certain procedural safeguards must be followed before a person is deprived of a significant property interest. Generally, he must be given notice of the creditor's claim, and an opportunity to be heard before his property may be seized. However, if the interests of the creditor cannot be protected by allowing such prior notice and hearing, then there must be other procedural safeguards to sufficiently protect the property rights of the alleged debtor. These

standards are meant to be flexible, to constitutionally accomodate the rights of all parties involved.

These requirements attach only when there has been a deprivation of a significant property interest. Appellees claim that a clear title is such a property interest. A lien, they argue, (1) clouds the title, and (2) restricts the alienation of the land, or at least reduces the market value; (3) the filing of the lien statement constitutes a taking; and (4) the provisions of the Oklahoma Mechanics' and Materialmen's lien statutes do not have the sufficient procedural safeguards required by the above cases, and are therefore unconstitutional.

The mere filng of the lien statement does not entitle the claimant to a lien on the land. 42 O.S.1971, § 141 provides that only a person who has in fact done work or furnished material on the property is entitled to a lien.[4] This presupposes a judicial determination. We said in *Hartford Accident and Indemnity v. Orr, Okl., 321 P.2d 373, 376-377, (1958):*

> "The filing of a lien claim is not ordinarily deemed the equivalent of the fact of the indebtedness which it concerns. As was said in Beebe v. Redward, 35 Wash.615, 77 P. 1052, 1055: 'It is at most only a tentative charge against the property it purports to bind, and is liable to be defeated * * * by showing that the indebtedness, or some considerable part thereof, is not owing.' "

The lien claimant gets nothing before judgment. The only prejudgment charge against the property is the notice of the lien claim. This notice serves the important functions of protecting the workman's claim from subsequent assignment of the property by the landowner, and of informing potential buyers of a pos-

[4] Under our slander of ittle action, 160.S.1971 §79 the landowner may recover costs, attorney fees and damages suffered for a slanderous notice of claim. 42 O.S.Supp.1980 §142.2 makes it a felony for any original contractor to falsify a lien statement to any owner of a dwelling.

sible economic charge running with the land. Real property law in this country is founded upon principles of notice. To hold that the notice alone can constitute a taking of a significant property interest would severely restrict its entire purpose. The Supreme Court of Colorado, in rejecting a very similar constitutional attack to their lien statutes observed, in *Bankers Trust Co. v. El Paso Pre-Cast Co., et al., Colo. 560 P.2d 457, 462-463, (1977):*

> "To require the full panoply of due process protections before filing a lien statement would impair the notice function of the lien statements. In the interval between the time of the work, the furnishing of materials or services giving rise to lien claim and the hearing on the lien, prospective purchasers would have no notice of the potential lien. The very 'deprivation' complained of by [appellant], the difficulty in alienating property against which a lien has been filed, indicated the effectiveness and importance of the notice function of lien statements."

The issue of the constitutionality of lien statutes relative to federal due process requirements has been considered by many other jurisdictions in the past few years. While some hold that the filing of the lien statement constitutes a significant taking of a property interest,[5] we cannot do so. We are more persuaded by the rationale adopted by the majority of jurisdictions which

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[5] Jurisdictions declaring their mechanics' lien statutes unconstitutional on the grounds that they are violative of due process include: *Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc., 362 A.2d 778, 168 Conn. 371, vacated 423 U.S. 809, on remand 365 A.2d 393, 170 Conn. 155, cert.den. 429 U.S. 889 (1976)(Conn.1974); Barry Properties, Inc. v. Fisk Bros. Roofing Co., 353 A.2d 222, 277 Md. 15 (Md.1976).* Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the grounds that they contain procedural safeguards sufficient to satisfy due process include: *Connolly Development, Inc. v. Superior Court of Merced Country, 553 P.2d 637, 132 Cal.Rptr. 477, 17 C.3d 803, appeal dismissed 97 S.Ct. 778 (Cal.1976); Ruocco v. Brinker, 380 F.Supp. 432 (Fla.1974).*

have considered the issue, that the filing of the lien statement is a *de minimis* taking to which due process protection does not attach.[6] The landowner is not deprived of substantial use and enjoyment of the property. The statement merely gives notice to all that a claim *may* be enforced against the land. Without suit being filed, the claim itself expires by limitation of law. 42 O.S.1971, § 177. In this regard, it is much the same as the lis pendens notice required when a suit is commenced concerning title to land. Appellees contend that the statute allows lien claimants to "extort" their claim from the landowner who wants to discharge the lien. We do not think that his danger is so apparent. If so, common sense would require a pre-filing hearing on the merits of a claim, not only for lien suits, but for any civil action, resulting in an unbearable administrative burden on the courts. On balance, the notice function, as well as administrative necessity, outweighs the minimal interference to property resulting from mere filing of the claim. We agree with the view expressed by the Missouri Supreme Court in *Home Building Corp. v. The Ventura Corp., et al., Mo., 568 S.W.2d 799 (1978),* where the court noted that the existence of the lien may have an economic effect and said:

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[6] Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the grounds that the filing of a mechanics' lien does not constitute the taking of a significant property interest include: *Spielman-Fond v. Hanson's Inc., 379 F.Supp. 997, affirmed 417 U.S. 901 (Ariz.1973); Nelson-American Developers, Ltd. v. Enco Engineering Corp., 337 So. 2d 729 (Ala.1976); Banker's Trust Co. v. El Paso Pre-Cast Co., 560 P.2d 457 (Colo.1977); Tucker Door & Trim Corp. v. 15th St.Co., 221 S.E. 2d 443, 235 Ga. 727 (Ga.1975); Keith Young & Sons Const. Co. v. Victor Senior Citizens Housing, Inc., 262 N.W.2d 554 (Iowa 1978); Carl A. Morse, Inc. v. Rentar Industries Development Corp., 341 N.Y.S.2d 425 (N.Y.1975); B&P Development Co. v. Walker, 420 F.Supp. 704 (Penn.1976); Cook v. Carlson, 364 F.Supp. 24(S.Dak. 1973); In re Thomas A.Cary, Inc., 412 F.Supp. 667 (Va.1976); Home Bldg. Corp. v. The Ventura Corp. and Housing Authority of the City of Nevada, Missouri, 568 S.W.2d 799 (Mo.1978); Silverman v. Gossett, 553 S.W.2d 581 (Tenn.1977); So.Cent.Dist. Pentecostal Church of God of America, Inc. v. Bruce-Rogers Co., Ark., 599 S.W.2d 702 (1980).*

". . . but that does not deprive the owner of a significant property interest. The possession and use of the property is retained and the owner may sell, lease or encumber. The situation is comparable to several others wherein a pending suit has some economic impact on an owner but does not deprive it of a significant property interest . . . It is comparable to the filing of a lis pendens notice. Such suits are instituted and maintained without the requirement of a hearing before filing to test the validity of the asserted claim." (At 774).

The United States Supreme Court has spoken only indirectly on the constitutionality of mechanics' lien statutes by its summary affirmance of *Spielman-Fond, Inc. v. Hansons, Inc., 379 F.Supp. 997 (D.Ariz. 1973), aff'd. 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed 2d 208 (1974).* In this case, the Arizona lien statutes were upheld by the district court. While we realize the Supreme Court's summary affirmance does not necessarily show approval of the reasoning used by the District Court[7], we agree with the rationale expressed therein where it was said:

"Here, a lien is filed against the property and clouds title. It cannot be denied that the effect of such lien may make it difficult to alienate the property. If the plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be

[7] The United States Supreme Court summarily affirmed *Spielman-Fond* without opinion. The precedential significance of a summary affirmance by the United States Supreme Court was discussed by Justice Burger in *Fusari v. Steinberg, 419 U.S. 379, 95 S.Ct. 533, 541, 42 L.Ed 2d 521 (1975),* when he wrote: "When [the Supreme Court] summarily affirm[s] without opinion the judgment of a three-judge district court [the Court] affirm[s] the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument. Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."

> more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him." (379 F.Supp. at 999).

Appellees claim that this is an "unrealistic" appraisal of the effect the lien filing has on the property. We need only note that in the case at bar, Lewis Avenue Investment Company, the original landowner in this case, was in fact able to sell the Broken Arrow property to appellee PRCC notwithstanding the existence of the very lien statement complained of here.

Appellees cite two state cases where the states' mechanics' lien laws were held unconstitutional on due process grounds, and urge us to adopt the rationale expressed therein. *Roundhouse Construction Corp. v. Telesco Masons Supplies, Conn., 362 A.2d 778, vacated and remanded 423 U.S. 809 (1975), reaff'd on both state and federal grounds, Conn., 365 A.2d 393, Cert. denied, 429 U.S. 889 (1976). Barry Properties Inc. v. Fick Bros. Roofing Co., Md. 353 A.2d 222 (1976).* We do not find these cases persuasive. In *Barry,* the court found the lien statutes unconstitutional because the lien attached to the property as soon as the work was performed or the materials supplied. It then upheld the validity of the lien claimed in that case by "excising" the offending portion and construing the statute to mean that the lien claimant really had only a possibility of a lien before judicial determination. Therefore, the court reasoned, the lien statement did not legally divest the landowner of any interest in his property prior to such judicial determination, which, of course, afforded adequate due process. We do not see how this result is consistent with the court's holding that the lien deprives the landowner of a significant property interest. We agree with the dissenting opinion at page 237 (dissenting only to result) that:

> "Appellant was either deprived of due process or he was

> not, and if he was, the deprivation cannot be rectified by acknowledging it on the one hand and ignoring it on the other. If it is the view of the majority that appellant suffered no denial of due process, that holding is dispositive of the case and this Court has no business in purporting to hold the lien facially unconstitutional."

In the *Roundhouse* case, we note that the United States Supreme Court denied certiorari because the judgment rested on adequate state ground, at *429 U.S. 889, 97 S.Ct. 246, 50 L.Ed 2d, (1976).* We think it is reasonable to conclude, as the court did in *South Central District, etc., v. Bruce-Rogers Co., Ark., 599 S.W.2d 702 (1980), see footnote 2,* that the United States Supreme Court considered its summary affirmance in *Spielman-Fond, Inc. v. Hansons, Inc. supra, to be applicable, or the state ground would have been immaterial.*

Moreover, we agree with the opinion expressed by the court in *Home Building Corp. v. Ventura Corp., et al, supra, at 775,* about these two cases that:

> "They impose a very strict limitation on the reasonable efforts of a state to protect those who supply labor and materials to make improvements to real estate. Such results, in our judgment, are not dictated by the decisions in *Sniadach, Fuentes, Mitchell, and North Georgia.*"

We hold that the filing of a lien statement under our mechanics' and materialmen's lien statutes in only a *de minimis* interference with the use and enjoyment of the property involved.[8] As such, it does not amount to a taking of a significant

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[8] The legislature, since the filing of this action, has become more sensitive to the kinds of issues raised by appellants, evidenced by its recent enactments of protective provisions for the landowner. 42 O.S.Supp.1979 §143.1 now requires notice be given the landowner by any lien claimant (see fn.2). 42 O.S.Supp.1980 §§142.1, 142.2 require an original contractor to furnish the owner of property occupied as a dwelling a notice, before the commencement of any work or furnishing of any material, to be signed by the owner, inform-

property interest to which the requirements of either state or federal due process attach. Therefore, the summary judgment granted appellees holding those statutes unconstitutional is REVERSED.

REVERSED AND REMANDED.

LAVENDER, C.J., IRWIN, V.C.J., and WILLIAMS, BARNES, DOOLIN, HARGRAVE, & OPALA, JJ., CONCUR.

HODGES, J., DISSENTS.

Footnote 8 continued . . .

ing the owner of certain rights and liabilities to which he is subject under the lien laws. Failure to give such notice, dated and signed by the landowner, renders the lien unenforceable.

APPENDIX B

FOR OFFICIAL PUBLICATION

No. 51,141

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
State of Oklahoma
NOV 25, 1980
ROSS N. LILLARD, JR.
Clerk

MOBILE COMPONENTS, INC., a corporation;
PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC., formerly PLANNED RESIDENTIAL COMMUNITIES OF OKLAHOMA, a corp.;
HAMILTON INVESTMENT TRUST, a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER dba LASATER ELECTRIC;
D. McGLUMPHY dba MAC'S ELECTRIC CO.;
RAYMOND P. SEMONES dba TWILITES MFG. CO.;
TOM B. CHILDERS dba TOM B. CHILDERS GRADING & ESCAVATING, INC.;
MURPHY PAINT & DRYWALL, INC.;

MILLER CONSTRUCTION CO. OF TULSA, INC.;
BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA;
IRRIGATION CONSTRUCTION CO.;
REX INVESTMENT CORPORATION;
RAMON L. KING;
PATRICIA A. KING;
PLYWOOD OF TULSA, a division of International Forest Products Corporation;
BANK OF OKLAHOMA formerly NATIONAL BANK OF TULSA;
UNITED BANK;
TULSA CONTAINER, INC.;
UNIVERSAL CONTRACTING CORPORATION, a corporation;
JACK R. SOWLES and JAMES C. METZKER, Individually and dba LEWIS AVENUE INVESTMENT COMPANY
MIDLAND MORTGAGE CO., INC.;
EVANS AND MITCHELL, a Georgia corporation;
UNITED STATES OF AMERICA;
GERALD W. BLAKELEY, JR., et al., Trustees of CABOT, CABOT, AND FORBES LAND TRUST, Massachusetts Business Trust;
AMULCO ASPHALT CO.;
JERRY WENDLAND;
CHARLES WENDLAND;
GENERAL ELECTRIC COMPANY;
R. A. YOUNG & SON, INC., a foreign corporation;

SOUTHWEST MANUFACTURING CO.;
JOHN F. CANTRELL, Treasurer of
Tulsa County, Oklahoma;
PAUL F. HELMUTH HALL & DOOR;
GREENHILL CONSTRUCTION CO.;
DUOSKIN, INC.;
SIZEMORE, SACK & SIZEMORE;
and ANSLIE PERRAULT

Appellees

vs.

VERLEE C. LAYON, Executrix of the Estate of
THOMAS LAYON, SR., Deceased

Appellant

Consolidated With

VERLEE C. LAYON, Executrix of the Estate of
THOMAS LAYON, SR., Deceased

Appellant

vs.

FIRST NATIONAL BANK OF TULSA;
THE OUTRIGGER, INC.;
UNIVERSAL CONTRACTING CORPORATION,
a foreign corp.;
MARTI STRATTON dba MARTI'S
COMMERCIAL INTERIORS;
LEWIS AVENUE INVESTMENT COMPANY,
an Oklahoma general partnership with
Jack R. Sowles and James M. Metzker;
PLANNED RESIDENTIAL COMMUNITIES
CONSTRUCTION COMPANY OF
OKLAHOMA, INC.;

HAMILTON INVESTMENT TRUST,
a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER dba LASATER ELECTRIC;
D. McGLUMPHY dba MAC'S ELECTRIC CO.;
CONCRETE SPECIALTIES OF TULSA, INC.;
RAYMOND P. SEMONES dba TRILITES MANUFACTURING CO.;
TOM B. CHILDERS;
MURPHY PAINT & DRYWALL, INC.;
PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY;
MILLER CONSTRUCTION CO. OF TULSA, INC.;
TURNER ROOFING AND SHEET METAL, INC.;
MOBILE COMPONENTS CORPORATION,
a foreign corporation;
R. A. YOUNG & SON, INC.,
a foreign corporation;
THE BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA;
DUOSKIN, INC.;
and SIZEMORE, SACK & SIZEMORE;

Appellees

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA, HONORABLE WILLIAM W. MEANS, JUDGE

HODGES, J., Dissenting.

I cannot agree with the majority opinion that the filing of a lien statement under the Oklahoma Mechanics' and Materialmen's lien statutes constitute only a de minimis interference with the use and enjoyment of real property[1] or that it does not approach a taking of a significant property interest requiring the protection of state and federal due process. Nor am I persuaded that because the original landowner in this case was "in fact able to sell the Broken Arrow property to appellee, PRCC, notwithstanding the existence of the very lien statement complained of here" that the filing of the lien statement was not detrimental, and that the statutes are not unconstitutional. The decision in this case has a sweeping effect throughout the state and the building industry. Reliance on the facts in this particular case exemplifies the old saw, "bad facts make bad law."

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[1] The mischief which may be wrought by frivolous, malicious, or fraudulent lien claimants is graphically illustrated by an article which appeared in The Daily Oklahoman in 1979:

BANKS, OFFICIALS LAUNCH SEARCH
Liens Tie Up Billions in Colorado

DENVER (AP)—A search continued Saturday for a "landowner and general entrepreneur," who filed at least $154.5 billion in liens against property owned by nearly a score of Coloradans, including Denver's mayor, district attorney and police chief.

Authorities said Kenneth Winchell filed nearly 100 liens in various courts in Denver and Summit County.

A bench warrant for Winchell's arrest was issued by Denver County Judge George Manerbino. Authorities said Winchell could face charges ranging from second-degree perjury to criminal mischief.

Denver District Judge Joseph Lilly also issued an order barring Winchell from filing more liens.

Winchell, who listed no home address, owns some land near Vail. Some of the liens he filed were against two banks which are suing him for alleged nonpayment of funds totaling more than $25,000.

I

The effective statutory provisions permit a general contractor to file a lien statement within four months after the date upon which the last labor is performed, or materials supplied to the job in the office of the clerk of the county where the land is situated. The statement needs only to divulge: the amount claimed and the items thereof as nearly as practicable; the names of the owner; the contractor and the claimant; and a legal description of the property.[2] The statute which is the subject of this appeal contains no provision for notice to the landowner.[3] There is no protective legislation to prevent the filing of

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Footnote 1 continued . . .

"We think he may be part of some right-wing group that files these kinds of things," said one official, who asked not to be identified.

Authorities in Nebraska say the courts in that state have been besieged since May by a spate of similar liens and lawsuits. The court actions are filed by persons angered by bureaucracy, authorities say.

"We think they're part of an organized group, but we're not sure," said a Nebraska official.

The liens, which cost only $2 to file, are legal documents claiming some interest in a property, usually a debt owed by the owner. They may be filed without showing any cause and, even if they have no basis in fact, can stop any sale, transfer or re-mortgage of the property. Fighting a lien can cost hundreds of dollars in legal fees.

The liens filed by Winchell protest income taxes and water laws and accuse one of four banks named in the liens of violating his constitutional rights.

"It's certainly a new twist," said one of the lien targets, who asked not to be identified. "You don't often hear of somebody who owes money filing liens. It's usually the other way around."

Winchell reportedly owes money to at least three Denver banks.

The liens he filed claim damages ranging from $2 million to $950 million. They name, among others, bank directors and officers, Denver Mayor Bill McNichols, District Attorney Dale Tooley and Police Chief Art Dill.

[2] 42 O.S. 1971 § 142.

[3] The statute was amended in 1977 to provide for notice by mail to the landowner. See 42 O.S. Supp. 1977 § 143.1.

an exaggerated or inflated claim, nor is there a provision which requires the posting of a bond to indemnify the landowner for costs and expenses he might incur in clearing title to his property.

The relevant provisions relating to subcontractors are the same as for general contractors, except that the lien statement must be filed within ninety days from the date of the last work performed or supplies furnished by the subcontractor and notice of the filing of the lien must be served on the owner.[4] There is no requirement that a foreclosure action be commenced for up to one year subsequent to the filing date.[5] A landowner may clear title to his property by posting bond in a suitable amount[6] or commencing a quiet title action. There is no other available remedy.

It is contended by the appellees that the Mechanics' and Materialmen's Lien Laws of the State of Oklahoma involve state action, and violate both the State and Federal Constitutions by depriving persons of property without due process of law because the statutes fail to provide for: any type of timely notice or hearing on the probable merits of the claim against the owners' property; and judicial participation at an early state of the proceedings; or for any type of bond or security to protect the owner against a wrongful taking.

II

Before the due process clause of the United States Constitution can be invoked, it must be shown that state action is in-

[4] 42 O.S. 1971 § 143.

[5] 42 O.S. 1971 § 172, 177.

[6] 42 O.S. 1971 § 147.

volved in the proceedings. Private action, however harmful, is not unconstitutional.[7] The fact that a state legalizes an action does not automatically mean that there has been state action. Mechanics' liens are created by the legislature. The filing of the lien involves a gamut of steps, all of which are mandated by state statutes. For a contractor to perfect his claim, he must file with the court clerk an affidavit stating the facts surrounding his claim which must be verified. The claim becomes a matter of public record, recorded by state employees in a state courthouse, and ultimately adjudicated in a state court. There can be no question but that the filing of the mechanics' lien involves a substantial amount of state action, and invokes the due process clauses of the State and Federal Constitutions.[8]

III

This is a case of first impression in Oklahoma, and the United States Supreme Court has not decided specifically what the due process clause of the Fourteenth Amendment requires concerning mechanics' liens. Resolution of the issue before us, consequently, turns not upon the application of specific precedent, but upon the general principles established by a line of decisions involving creditors' remedies.

In *Snidach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L. Ed. 2d 349 (1969),* the United States Supreme Court voided a Wisconsin prejudgment garnishment statute which permitted a creditor to freeze the wages of an alleged debtor, without prior notice or hearing, even though the creditor had no previous interest in the wages. The summons was issued by the

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[7] *Shelly v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).*

[8] See *Barry Properties, Inc. v. Fish Bros. Roofing Co., 353 A.2d 222 (Md. 1976); Connally Development, Inc. v. Superior Court of Merced Co., 553 P.2d 637 (Cal. 1976).*

court clerk, at the request of the creditor's attorney, without any judicial participation. The court held that, absent extraordinary circumstances, this statutory scheme violated the fundamental principles of due process.

Three years later, in the case of *Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972),* the court invalidated prejudgment replevin statutes in Florida and Pennsylvania, which allowed state agents to seize a person's personal property upon the ex parte application of another person claiming a right in the property. There was no prior notice or hearing concerning the writ, nor was there any judicial participation in its issuance. The court reiterated that: except in unusual situations, notice and an opportunity to an adversary-type hearing must be provided *before* an alleged debtor can be deprived of his property; the fact that the deprivation may be temporary and non-final is irrelevant; and due process protection extends to any significant property interest.

There was some clarification by the court in *Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974).* A Louisiana statute permitting sequestration of personalty to enforce the vendor's lien of a creditor who had made an installment sale of goods was upheld. The sequestration was made without prior notice or hearing. However, to obtain the writ, the creditor had to specify in an affidavit the facts, not conclusions, which supported his claim. The affidavit was examined by a judge, and upon his determination that it was adequate, the writ was issued. The creditor was required to file a bond which would compensate the debtor if the sequestration was unjustified. The debtor was allowed a prompt post-seizure hearing, and if the creditor failed to substantiate his claim, the debtor recovered not only his property, but also damages and attorneys' fees. The Court concluded that the judicial participa-

tion in these proceedings, and the protection afforded both sides, sufficiently accommodated the conflicting interests of the parties and satisfied the requirements of due process.

The Supreme Court's most recent opinion dealing with prejudgment garnishment remedies and due process is *North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).* In this case, the Court overturned, as contrary to due process, a Georgia statute authorizing garnishment in the form of freezing a commercial bank account. To obtain the garnishment, the claimant had to file an affidavit with the court clerk, stating the amount claimed, then post bond equal to twice that amount. The debtor could also dissolve the claim by filing a bond. The Court held this statutory scheme unconstitutional because it provided no prior notice or hearing, nor did it meet the *Mitchell* standard, which requires judicial participation in the proceedings, absent notice and hearing.

In analyzing these cases to determine the current due process standards for prejudgment garnishment statutes, it appears that in the absence of extraordinary circumstances, there are two avenues which are constitutionally permissible. *Snidach* and *Fuentes* indicate that before a debtor can be deprived of a significant property interest, the creditor must provide him with prior notice and hearing on the probable merits of the creditor's claim. If prior notice and hearing are not provided, *Mitchell* requires that: if an ex parte order is issued, there must be judicial participation in its issuance; the creditor must produce a sworn affidavit alleging specific facts entitling him to possession; there must be a prompt post-seizure hearing; and the creditor must post bond to protect the debtor against any damages, including attorney fees which he might incur as a result of the wrongful taking of his property.

IV

Although the majority relies heavily on *Spielman-Fond v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973); aff'd. 94 S. Ct. 2596, 417 U.S. 901, 41 L. Ed. 2d 208 (1974)*[9], this case is of little assistance in interpreting the Oklahoma lien laws. The pertinent Arizona Statutes, A.R.S. § 33-981, et seq., provide procedural safeguards which the Oklahoma Statutes, 42 O.S. 1971 § 141, et seq., lack. Actions to foreclose liens in Arizona must be brought within six months of filing, or the lien is discharged. The property owner may also dissolve the lien by posting a bond one and one-half times the amount claimed. If the lien is filed by one other than the contractor, the contractor must defend the action at his own expense. When the claim is filed, copies of the notice of the lien must be supplied to the county recorder where the property is located, and to the property owner, if he is within the county.

While the Oklahoma statutes do not contain some of the safeguards provided by the Arizona statutes, we would further disagree with the holding in *Spielman-Fond* that the deprivation caused by the filing of the mechanics' lien was *de minimis*. The Arizona court reasoned that the lien deprived the owner of neither the possession, nor the use of his property, and that, although the ability to sell or obtain credit on the property

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[9] To file a mechanics' lien in Arizona, the claimant must file the claim with the county recorder, and serve a copy of this claim with the property owner if he is within the county where the property is located. If the owner is not in the county, it is not necessary to provide him with notice. The claim must include a description and location of the property, the name of the owner, name of the claimant, the amount due and the date the work was completed. The claim is made under oath. The original contractor must file the lien within ninety days of completion of the work, all others have sixty days, The lien stays in effect for six months unless an action is brought within that time to foreclose. The owner can discharge the lien by posting bond in the amount of one and one-half times the amount of the claim.

might be curtailed, the owner was not legally deprived of his right to sell or encumber the land. The court followed the rationale of *Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973)* and ascertained that, although the lien may diminish the value of the land to the owner, the harm is often offset by the value added by the improvement upon which lien is based. The court also decided, even though securing a buyer might be difficult, the owner still had the right to alienate and that the lien did not deprive the owner of this right.

Even though the United States Supreme Court has had an opportunity to consider the constitutionality of statutorily created liens, it has failed to do so, and thus no clear precedent exists.[10] While some courts have elected to adhere to the theory that the filing of a mechanics' lien is a *de minimis* taking of property not worthy of due process protection,[11] I cannot do so. I am persuaded by the rationale adopted by other jurisdictions which holds that the imposition of a mechanics' lien without any judicial assessment of its merits constitutes a significant taking

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[10] See majority opinion, note 4.

[11] Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the grounds that the filing of a mechanics' lien does not constitute the taking of a significant property interest include:

Spielman-Fond v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973) aff'd. 417 U.S. 901 (1974); B & P Development Co. v. Walker, 420 F. Supp. 704 (W. D. Penn. 1976); In re Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. 1976); Cook v. Carlson, 364 F. Supp. 24 (D.S.D. 1973); Home Building Corp. v. The Ventura Corp. and Housing Authority of the City of Nevada, Missouri, 568 S.W.2d 769 (Mo. 1978); Keith Young & Sons Construction Co. v. Victor Senior Citizens Housing, Inc., 262 N.W.2d 554 (Iowa 1978); Bankers Trust Co. v. El Paso Pre-Cast Co., 560 P.2d 457 (Colo. 1977); Carl A. Morse, Inc. v. Rentar Industries Development Corp., 391 N.Y.S.2d 425 (N.Y. 1977); Silverman v. Gossett, 553 S.W.2d 581 (Tenn. 1977); Nelson-American Developers, Ltd. v. Enco Engineering Corp., 337 So. 2d 729 (Ala. 1976); Tucker Door & Trim Corp. v. 15th St. Co., 235 Ga. 727, 221 S.E.2d 433 (1975).

of property and is violative of due process.[12]

The purpose of the due process clauses is to rest the right of all persons upon the same rule under similar circumstance.[13] The imposition of a mechanics' lien without notice results in a significant taking of property. A great deal of time, effort and money is required to dislodge the cloud on the landowner's title. While the lienor is not required to post a bond to protect the owner from losses he might incur from the lien, or bear any other expense in order to impose a possibly invalid lien; the landowner is required to post a bond equal to the amount of the claim, attorneys' fees, court costs and interest.[14] This does not provide equal protection to the debtor and the claimant.

The greatest advantage in owning land is often not the actual possession of the property, but the collateral benefits which are derived from ownership.[15] These include the right to alienate, encumber, mortgage, lease, and acquire equity. A mechanics' lien has a drastic effect on these privileges. It clouds

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[12] Jurisdictions declaring their mechanics' lien statutes unconstitutional on the grounds that they are violative of due process include:

Roundhouse Construction Corp. v. Telesco Masons Supplies Co., Inc., 168 Conn. 371, 362 A.2d 778 (1975), vacated 423 U.S. 809, on remand 179 Conn. 155, 365 A.2d 393, cert. den. 429 U.S. 889 (1976); Barry Properties, Inc. v. Fisk Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976).

Jurisdictions upholding the constitutionality of their mechanics' lien statutes on the grounds that they contain procedural safeguards sufficient to satisfy due process include:

Ruocco v. Brinker, 380 F. Supp. 432 (S.D. Fla. 1974); Connolly Development, Inc. v. Superior Court of Merced County, 132 Cal. Rptr. 477, 17 Cal. 3d 803, 553 P.2d 637, appeal dismissed 97 S. Ct. 778 (1976).

[13] *Frost v. Corp. Comm'n., 278 U.S. 515, 522, 49 S. Ct. 235, 73 L. Ed. 483 (1929).*

[14] See 42 O.S. 1971 § 147.

[15] D. F. Lowry, Jr., "Creditors' Rights: The Constitutionality of Oklahoma's Mechanics' Lien Law," 31 Okla. L. Rev. 148, 159 (1978).

the title to the property, making it extremely difficult or even impossible to sell or mortgage the land. Even if a willing buyer is found, the owner often has to accept much less than the actual value of the property, and may, in some instances, be forced to pay an invalid claim in order to clear title to his property in time for a pending transaction to be consummated. The fact that some improvements have been made on the land is little comfort to the owner whose property has suffered a substantial diminution in value, especially when the lien is invalid or was filed because the owner has refused to pay for improvements which have been done in a shoddy or unworkmanlike manner.

V

The Mechanics' and Materialmen's Lien Statutes of the State of Oklahoma, 42 O.S. 1971 § 141, et seq., violate both the State and Federal Constitutions because they deprive persons of a significant property interest without due process of law. The Oklahoma statutes fail to meet either *Fuentes* or *Mitchell* standards. There is no prior notice or hearing, nor is there any judicial participation in the process. Almost all of the state statutes which have been found constitutional contain safeguards that Oklahoma's laws lack.[16] The Arizona statutes which were held constitutional in *Spielman-Fond* provided for notice to the owner if he was in the county. The Oklahoma statute, in effect at the time of this litigation did not provide for any notice to the property owner by the contractor.

With the exception of lack of notice to the landowner, the most apparent deficiency in the Oklahoma Mechanics' Lien Law is the absence of any provision for an immediate post-filing hearing to determine the validity of the lien. In *Connolly Dev.*,

[16] See note 11, supra.

Inc. v. Superior Court, 17 Cal. 3d 803, 822, 553 P.2d 637, 650, 132 Cal. Rptr. 477 (1976), the California Supreme Court determined that the recordation of a mechanics' lien deprived the property owner of a significant property interest, and constituted a taking within the meaning of the federal and state due process clauses. The court reasoned, however, that the California lien laws comported with due process requirements because twenty days *before* recording a mechanics' lien the claimant was required to serve a preliminary notice upon the owner, the contractor, and the construction lender.[17] By granting the owner twenty days advance notice of the lien, [a safeguard not provided by the sequestration law upheld in *Mitchell*], the California statutes permit the owner to investigate the basis of the lien, and seek a hearing before the lien becomes effective. This is a much greater protective device than the *Mitchell* right to ex parte judicial review of the application for a writ of sequestration. In California, upon receipt of the notice from one not entitled to claim a lien, the owner or lender may immediately file suit to enjoin the assertion of the lien.[18] By utilization of a temporary restraining order if necessary,[19] the property owner may secure a hearing before the lien is imposed, or he may seek immediate declaratory relief.[20] Actions for declaratory relief in California may claim priority on the calendar of the trial court.[21] The Oklahoma statutes do not provide for priorities on the court's calendar, and a property owner seeking relief pursuant to 42 O.S. 1971 § 177 would be subject to the same delays as in any civil action.

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[17] Cal. Code Civ. Process §§ 3097, 3114, 3160.

[18] Cal. Code Civ. Proc. § 526.

[19] Cal. Code Civ. Proc. § 527.

[20] Cal. Code Cov. Proc. § 1060.

[21] Cal. Code Civ. Proc. § 1062 (a).

Because mechanics' liens are imposed ex parte by the creditor and significantly affect the rights of the property owner, the imposition thereof poses a serious problem of procedural due process. The United States Supreme Court has clarified the requirements necessary to guarantee due process of law. In *Fuentes,* the Court held that due process requires prior notice, and an opportunity to be heard.[22] *Mitchell* held that a reasonable alternative is judicial participation in the process, and the posting of a bond to insure against any damages and attorney fees incurred. Even if the due process clauses do not require notice and hearing prior to every deprivation of a significant property interest, they do require a hearing at a meaningful time in a meaningful manner.[23] In failing to provide for an immediate post-perfection hearing, the mechanics' lien law leaves the debtor at the mercy of his creditor without providing any additional protection for the interest of the debtor. The procedural deficiencies of the Oklahoma lien laws render them unconstitutional.

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[22] See *Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-315, 70 S. Ct. 652, 657, 94 L. Ed. 865, 872-874 (1949);* and *Bomford v. Socony Mobil Oil Co., 440 P.2d 713, 719 (Okla. 1968).*

[23] *Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).* See also J. P. Ward, "The Constitutional Validity of Mechanics' Liens Under The Due Process Clause – A Reexamination After *Mitchell* and *North Georgia,* 55 B.U.L. 263 (1975).

APPENDIX C

FILED
SUPREME COURT
State of Oklahoma
FEB 18, 1981
ROSS N. LILLARD, JR.
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA
Wednesday, February 18, 1981

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

51,141 Mobile Components, Inc. v. Verlee C. Layon etc. Rehearing denied.

S/S Pat Irwin
Chief Justice

APPENDIX D

"§141. Right to lien-Priority-Enforceability against property-Constructive notice

Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material for the erection, alteration or repair of any building, improvement or structure thereon or perform labor in putting up any fixtures, machinery in, or attachment to, any such building, structure or improvements . . . shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances . . . Such liens shall be preferred to all other liens or encumbrances which may attach to or upon such land, buildings or improvements or either of them subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, . . . or the making of any such repairs or improvements; and such lien shall follow said property and each and every part thereof, and be enforceable against the said property wherever the same may be found, and compliance with the provisions of this Article shall constitute constructive notice of the claimant's lien to all purchasers and encumbrancers of said property or any part thereof, subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor.

"§142. Statement to be filed

Any person claiming a lien as aforesaid shall file in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed and the items thereof as nearly as practicable, the names of the owner, the contractor, the claimant, and a description of the property subject to the lien, verified by affidavit . . . Such statement shall be filed within four months after the date upon

which material was last furnished or labor last performed under contract as aforesaid . . .

"§143. Lien by or through subcontractor

Any person who shall furnish any such material or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, or improvements, or both from the same time, in the same manner, and to the same extent as the original contractor for the amount due him for such material and labor . . . by filing with the clerk of the district court of the county in which the land is situated, within ninety (90) days after the date upon which material was last furnished or labor last performed under such subcontract, a statement, verified by affidavit, setting forth [same as in §142] and by serving a notice in writing of the filing of such lien upon the owner of the land, or improvements, or both . . . ."

* * *

"§147 Discharge of lien

Any person against whom a claim is filed under the provisions of the law relating to mechanics' and materialmen's liens may at any time upon three (3) days notice in writing to the claimant discharge such lien by depositing with the Court Clerk in whose office such lien claim has been filed the amount of such claim in cash and executing and filing with such Court Clerk a good and sufficient bond to the claim and with adequate, solvent sureties conditioned that such person will pay any reasonable attorney's fee and all court costs, and interest, that may be adjudged against him finally by any Court of competent jurisdiction in the event such claimant recovers judgment on such claim in the amount for which such claim is filed; Provided; the deposit of such cash and the execution and filing of such

bond shall not operate to discharge such lien until the expiration of five (5) days after the deposit of such cash and the filing of such bond, during which time the lien claimant may apply to such Clerk to have the surety on such bond increased, and if upon such investigation the bond proves to be insufficient the Clerk shall immediately require such additional surety thereon as may be necessary to make such bond solvent, and the lien shall not be discharged until any additional surety ordered shall have been given and approved."

* * *

"§172. Enforcement by Civil action-Limitations-Practice, pleading and proceeding-Amendment of lien statement

Any lien provided for by this Chapter may be enforced by civil action in the District Court of the County in which the land is situated, and such action shall be brought within one year from the time of the filing of said lien with the Clerk of said Court . . . [I]n case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed.

* * *

"§175. Sale of property after judgment

In all cases where judgment may be rendered in favor of any person or persons to enforce a lien under the provisions of this Chapter, the real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sales to be without prejudice to the rights of any prior encumbrancer, owner or other person not a party to the action.

* * *

"§177. Suite by owner to determine lien and cancelation of lien on docket

If any lien shall be filed under the provisions of this Chapter, and no action to foreclose such lien shall have been commenced, the owner of the land may file his petition in the district court of the county in which said land is situated, making said lien claimants defendants therein, and praying for an adjudication of said lien so claimed, and if such lien claimant shall fail to establish his lien, the court may tax against said claimant the whole, or such portion of the costs of such action as may be just: Provided, that if no action to foreclose or adjudicate any lien filed under the provisions of this chapter shall be instituted within one year from the filing of said lien, the clerk of the district court shall enter under the head of "Remarks," in the mechanics' lien docket hereinbefore named, that said lien is canceled by limitation of law."

APPENDIX E

CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

No. C-75-1071

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, STATE OF OKLAHOMA

FILED
DISTRICT COURT
State of Okla. Tulsa County
JUL 18, 1977
DON E. AUSTIN
Clerk

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., deceased
Substituted Plaintiff

vs.

FIRST NATIONAL BANK OF TULSA;
THE OUTRIGGER, INC.;
UNIVERSAL CONTRACTORS CORPORATION,
a foreign corporation;
MARTI STRATTON, d/b/a MARTI'S COMMERCIAL INTERIORS;
LEWIS AVENUE INVESTMENT COMPANY,
an Oklahoma general partnership with Jack R. Sowles and James C. Metzker;
PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC.;
and HAMILTON INVESTMENT TRUST,
a voluntary business association of Massachusetts with Paul Stillman as a Trustee
Defendants

ORDER GRANTING SUMMARY JUDGMENT

NOW on this 31st day of May, 1977, the Court having considered the Motion for Summary Judgment filed in this case by Plaintiff and the Motion for Summary Judgment filed in this case by the Defendants, THE OUTRIGGER, INC., FIRST NATIONAL BANK OF TULSA, PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC. and HAMILTON INVESTMENT TRUST, and having carefully considered the authorities cited in the briefs submitted by counsel and having considered the argument made by counsel does hereby find as follows:

(1) The Motion for Summary Judgment filed by the Plaintiff should be overruled because certain issues of fact are in dispute.

(2) The Third Amended Petition of Plaintiff should be dismissed because it is based entirely upon the mechanic's and materialmen lien statutes of the State of Oklahoma [42 O.S. §141, et seq. (1971)] and those statutes are unconstitutional and void because they fail to provide due process of law as required by the Fourteenth Amendment of the United States Constitution and Article 2, Section 7 of the Oklahoma Constitution.

(3) All other issues raised by the Motions for Summary Judgment need not be ruled upon by the Court because ruling on said issues is deemed unnecessary in light of the above findings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

(1) The Motion for Summary Judgment filed by the Plaintiff is hereby overruled.

(2) The Third Amended Petition of Plaintiff is hereby dis-

missed because it is based entirely upon the mechanic's and materialmen lien statutes of the State of Oklahoma and those statutes are unconstitutional and void because they fail to provide due process of law as required by the Fourteenth Amendment of the United States Constitution and Article 2, Section 7 of the Oklahoma Constitution.

(3) No other issues raised by the Motions for Summary Judgment are ruled upon at this time because ruling on said issues is unnecessary in light of this Order.

William W. Means
Judge

APPROVED AS TO FORM:

S/S Wesley R. Thompson
Wesley R. Thompson, Attorney for the Plaintiff

S/S Joseph A. McCormick
Joseph A. McCormick, Attorney for the Defendants, First National Bank of Tulsa and The Outrigger, Inc.

S/S John R. Barker
John R. Barker, Attorney for the Defendants, Planned Residential Communities Construction Company of Oklahoma, Inc. and Hamilton Investment Trust

APPENDIX G

No. 51141

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
State of Oklahoma
JUN 28, 1977
ROSS N. LILLARD, JR.
Clerk

MOBILE COMPONENTS, INC., a corporation
Appellee

vs.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased
Appellant

PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC., formerly PLANNED RESIDENTIAL COMMUNITIES of Oklahoma, a corporation;
HAMILTON INVESTMENT TRUST, a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER d/b/a LASATER ELECTRIC;
D. McGLUMPHY d/b/a MAC'S ELECTRIC CO.;
RAYMOND P. SEMONES d/b/a TWILITES MFG. CO.;
TOM B. CHILDERS d/b/a TOM B. CHILDERS

GRADING & ESCAVATING, INC.;
MURPHY PAINT & DRYWALL, INC.;
MILLER CONSTRUCTION CO. OF TULSA, INC.;
R. A. YOUNG & SON, INC., a foreign corporation;
BOARD OF COUNTY COMMISSIONERS OF TULSA COUNTY, OKLAHOMA;
IRRIGATION CONSTRUCTION CO.;
REX INVESTMENT CORPORATION;
RAMON L. KING;
PATRICIA A. KING;
PLYWOOD OF TULSA, a division of International Forest Products Corporation;
BANK OF OKLAHOMA formerly NATIONAL BANK OF TULSA;
UNITED BANK;
TULSA CONTAINER, INC.;
UNIVERSAL CONTRACTING CORPORATION, a corporation;
JACK R. SOWLES and JAMES C. METZKER, Individually and d/b/a LEWIS AVENUE INVESTMENT COMPANY;
MIDLAND MORTGAGE CO., INC.:
EVANS AND MITCHELL, a Georgia corporation;
UNITED STATES OF AMERICA;
GERALD W. BLAKELEY, JR., et al, Trustees of CABOT, CABOT, AND FORBES LAND TRUST, a Massachusetts Business Trust;
AMULCO ASPHALT CO.;
JERRY WENDLAND;
CHARLES WENDLAND;
GENERAL ELECTRIC COMPANY;
R. A. YOUNG & SON, INC.,a foreign corporation;

SOUTHWEST MANUFACTURING CO.;
JOHN F. CANTRELL, Treasurer of Tulsa County, Oklahoma;
PAUL F. HELMUTH HALL & DOOR;
GREENHILL CONSTRUCTION CO.;
DUOSKIN, INC.;
SIZEMORE, SACK & SIZEMORE; and
ANSLIE PERRAULT

Appellees

Consolidated With

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased

Appellant

vs.

FIRST NATIONAL BANK OF TULSA;
THE OUTRIGGER, INC.;
UNIVERSAL CONTRACTING CORPORATION, a foreign corporation;
MARTI STRATTON d/b/a MARTI'S COMMERCIAL INTERIORS;
LEWIS AVENUE INVESTMENT COMPANY, an Oklahoma general partnership with Jack R. Sowles and James M. Metzker;
PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC.;
HAMILTON INVESTMENT TRUST, a voluntary business association of Massachusetts with Paul Stillman as a Trustee;
MARVIN LASATER d/b/a LASATER ELECTRIC;
D. McGLUMPHY d/b/a MAC'S ELECTRIC CO.;
CONCRETE SPECIALTIES OF TULSA, INC.;

RAYMOND P. SEMONES d/b/a TWILITES MFG. CO.;
TOM B. CHILDERS;
MURPHY PAINT & DRYWALL, INC.;
PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY;
MILLER CONSTRUCTION CO. OF TULSA, INC.;
TURNER ROOFING AND SHEET METAL, INC.;
MOBILE COMPONENTS CORPORATION, a foreign corporation;
R. A. YOUNG & SON, INC., a foreign corporation;
THE BOARD OF COUNTY COMMISSIONERS of TULSA COUNTY, OKLAHOMA;
DUOSKIN, INC.; and
SIZEMORE, SACK & SIZEMORE
Appellees

PETITION IN ERROR

COMES NOW the Appellant, VERLEE C. LAYON, Executrix of the Estate of Thomas Layon, Sr., Deceased, by and through her attorney of record, Wesley R. Thompson, and states to the Court as follows, to wit:

That on May 31, 1977, in Consolidated Cases Numbered C-75-1960 and C-75-1071, in the District Court of Tulsa County, State of Oklahoma, wherein the above styled Appellant and Appellees were parties, the Honorable Judge William Means entered a final judgment sustaining Motions for Summary Judgment filed by the Appellees, Trustees of Hamilton Investment Trust; Planned Residential Communities Construction Company of Oklahoma, Inc.; First National Bank of Tulsa; and,

The Outrigger, Inc., ruling that the Oklahoma Mechanics and Materialmen Lien Law, 42 O.S. §141, et seq., was unconstitutional and dismissed Appellant's cause.

Appellant brought her action for foreclosure of a Materialman's lien upon property located in Tulsa County, Oklahoma. On May 31, 1977, at the pre-trial conference of said cause, the Honorable Judge Means declared the Oklahoma Mechanic's and Materialmen Lien Law unconstitutional, thereby sustained the Motions for Summary Judgment filed by the Appellees, Trustees of Hamilton Investment Trust; Planned Residential Communities Construction Company of Oklahoma; First National Bank of Tulsa; and, The Outrigger, Inc., and further overruled Appellant's Motion for Summary Judgment.

Appellant at this time urges that the Honorable Judge Means erred and was incorrect since the Oklahoma Mechanics and Materialmen Lien Law, 42 O.S. §141, et seq. is constitutional; Further, the trial court erred when it sustained the Appellees, Trustees of Hamilton Investment Trust; Planned Residential Communities Construction Company of Oklahoma; First National Bank of Tulsa; and, The Outrigger, Inc., Motions for Summary Judgment; Further, said trial court erred when it did not sustain Appellant's Motion for Summary Judgment at the pre-trial conference on May 31, 1977, since no material fact controversy remained for trial and Appellant was entitled to judgment as a matter of law.

Further, the trial court erred in its rulings because the verdict and judgment is not sustained by the pleadings and evidence on file in this cause, and is contrary to law.

Appellant hereby attaches her Designation of Record of Appeal in this cause marked Exhibit "A" and by this reference made a part hereof.

WHEREFORE, Appellant prays said judgment dismissing Plaintiff's cause and overruling her Motion for Summary Judgment, entered May 31, 1977, in the District Court of Tulsa County, State of Oklahoma, be reversed, set aside, and held for naught, and that judgment be rendered in favor of Appellant and against the Appellees upon the facts as disclosed by the record on appeal and upon the law applicable thereto, and that Appellant be restored to all her rights lost by the rendition of the above stated judgment, and for all other further relief this Court might deem just and proper.

WESLEY R. THOMPSON
Attorney for Appellant

S/S Wesley R. Thompson

Post Office Box 1364
Sapulpa, OK 74066

APPENDIX H

No. 51141

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
State of Oklahoma
NOV 16, 1977
ROSS N. LILLARD, JR.
Clerk

MOBILE COMPONENTS, INC., a corporation
Appellee

vs.

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON, SR., Deceased
Appellant

PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC., et al
Appellees

Consolidated With

VERLEE C. LAYON, Executrix of the Estate of THOMAS LAYON SR., Deceased
Appellant

vs.

FIRST NATIONAL BANK OF TULSA, et al
Appellees

ACTION TO FORECLOSE MECHANICS' LIEN
APPEAL FROM DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
HONORABLE JUDGE WILLIAM MEANS

APPELLANT'S BRIEF IN CHIEF

STATEMENT OF FACTS

Prior to August 3, 1973, Universal Contracting Corporation acted as a prime contractor and entered into a contract or contracts with, the landowner, Lewis Avenue Investment Company, to erect 700 apartment units on the property described as: LOT ONE (1), AND LOT TWO (2), BOTH IN BLOCK THREE (3), CROWN IMPERIAL ADDITION TO THE CITY OF TULSA, ACCORDING TO THE RECORDED PLAT THEREOF, and 275 apartment units on the property described as: ALL OF LOT ONE (1), BLOCK ONE (1), CROWN IMPERIAL SECOND ADDITION, AN ADDITION TO THE CITY OF BROKEN ARROW.

Thereafter, but still prior to August 3, 1973, Universal Contracting Corporation in pursuance of its contract to build these 975 apartment units subcontracted to Marti Stratton d/b/a Marti's Commercial Interiors, work to be done upon all the apartment units mentioned in paragraph above; specifically the job of carpeting all the said apartment units on the property described in paragraph above.

Century Interiors, Inc., as a sub-sub-contractor contracted with Marti Stratton d/b/a Marti's Commercial Interiors on August 3, 1973, to perform the job of carpeting all the apartments mentioned above, and this work was performed as a sub-sub-contractor under the prior contracts mentioned above.

On July 17, 1974, lien claimant Century Interiors, Inc.,

filed a Mechanics' Lien No. 61251 in the amount of $17,115.37 for work done under a contract to install carpeting in apartments on these two (2) tracts of land, one located in Tulsa and referred to in the lien by street address, and the other in Broken Arrow referred to by legal description. Both pieces of property were then owned by Lewis Avenue Investment Company. Century Interiors' lien was properly recorded by the Tulsa County Court Clerk and indexed by landowners name placing all persons on notice of this lien claim.

That on or about July 29, 1974, lien claimant Century Interiors, Inc. served Notice of filing of Mechanics' and Materialmen's Lien upon the then owner of all the above property, Lewis Avenue Investment Company.

On or about December 4, 1974, the above lien No. 61251 was legally and properly assigned to Thomas Layon, Sr., in the manner provided by Oklahoma Law.

In May, 1975, an Amended Mechanics' and Materialmen's Lien was filed by Thomas Layon, Sr., amending the above lien to describe both the Broken Arrow and Tulsa tracts by legal description. Thomas Layon, Sr., has since become deceased and his executrix, Verlee C. Layon, has been substituted as the party plaintiff.

On May 31, 1977, at the pretrial conference in this cause the Motions for Summary Judgment filed by Appellees, Trustee of Hamilton Investment Trust; Planned Residential Communities Construction Company of Oklahoma, Inc.; First National Bank of Tulsa; and The Outrigger, Inc., was sustained by the Honorable Judge Means when he found the Oklahoma Mechanics' and Materialmen's Lien Law, 42 O.S. §141, et seq, unconstitutional and dismissed Appellant's case; further, at the same hearing, said Judge further overruled Appellant's Motion

for Summary Judgment. From these rulings Appellant appeals to this Court. (Record pp. 427-428).

ARGUMENTS

I. Clear logic and the weight of current legal authority show Oklahoma's Mechanic's Lien Statutes are not unconstitutional:

Defendants, Appellees herein, argue that the Oklahoma Lien Statutes which are similar to Lien Statutes in many other States are suddenly in violation of the Fourteenth Amendment to the United States Constitution because they do not require the prospective lien claimant to give the land owner advance notice and some form of judicial hearing on his right to file, prior to filing a lien claim statement with the Court Clerk. Since Oklahoma has no ruling decision on this point reference to the decisions in other jurisdictions is in order. There appears to be a variance of opinion as to how and why these statutes do not violate the due process clause of the Constitution but the clear weight of authority shows these lien statutes are not constitutionally defective. Quotations hereafter are somewhat lengthy in order to present a clear picture of the reasoning involved in these decisions.

In the case entitled *Spielman-Fond, Inc., vs. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz., 1973) the Court found the Arizona Mechanic's and Materialmen's lien statute constitutional and stated as follows, to wit:

> "Plaintiffs rely on *McClellan v. Commercial Credit Corp.*, 350 F. Supp. 1013 (D.R.I. 1972), aff'd 409 U.S. 1120, 93 S. Ct. 935, 35 L. Ed. 2d 253 (1973). There a Three-Judge Court held the Rhode Island attachment statutes unconstitutional, relying on *Snidach, Goldberg and Fuentes.* The case is inapposite because there, unlike here, property, viz. automobiles, was taken from the physical possession of the plaintiffs.

For the same reason, plaintiffs' reliance on a long series of cases is misplaced because they all involved an actual taking or deprivation of property, rights or entitlements. *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (unwed father's right to association with his children): *Bell vs. Burson,* 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (driver's license); *Adams vs. Egley,* 338 F. Supp. 614 (S.D. Cal. 1972) (goods); *Tindall v. Hardin,* 337 F. Supp. 563 (W.D. Pa. 1972) (food stamps): *White v. Minter,* 330 F. Supp. 1194 (D. Mass. 1971) (mother's association with children pending determination of her fitness): *Davis vs. Weir,* 328 F. Supp. 317 (N.D. Ga., 1971) (water): *Crow vs. California Dept. of Human Resources,* 325 F. Suppl 1314 (N.D. Cal 1970) (employment compensation benefits): *Desmond v. Hatchey,* 315 F. Supp. 328 (D. Me. 1970) (freedom from incarceration for failure to pay a debt): *Golliday v. Robinson,* 305 F. Supp. 1224 (N.D. Ill. 1969) (welfare benefits).

Plaintiffs claim that there has been in effect a taking here. A lien, it is argued, clouds title and can in many situations amount to an absolute prohibition on the right to alienate property. Thus, by taking away the right to alienate property freely, the lien statues have taken away a significant property interest. Plaintiffs cite *Shelley v. Kramer,* 331 U.S.I. 68 S. Ct. 836, 92 L. Ed. 1161 (1947): *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L. Ed. 149 (1917), and *Kass v. Lewin,* 104 So. 2d 572 (Fla. 1958), as authority for their argument that the right to alienate property is a right which cannot be infringed. Those cases did, indeed, reaffirm the importance of the right to alienate property. But all the cases involved direct and total prohibitions on the right to alienate. The prohibitions involved were such that, even if a seller could find a willing buyer, the statutory or contractual prohibitions involved prevented consummation of the transaction. That is a different situation from the case at

bar. Here, a lien is filed against the property and clouds title. It cannot be denied that the effect of such lien may make it difficult to alienate the property. If the plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be amcliorated through the use of bonding or titled insurance.

We conclude, therefore, that the filing of a mechanics' and materialmen's lien does not amount to a taking of a significant property interest, and that, accordingly, A.R.S. §33 981 et seq. are not violative of due process of law under the Fourteenth Amendment for failing to provide for notice and hearing prior to the filing of the lien." *Spielman-Fond* at 999-1000.

In the case of *Cook v. Carlson,* 364 F. Supp. 24 (S.D. So. Dakota, 1973) the Court found that no prior notice and opportunity to be heard is constitutionally necessary before a mechanics' and materialmen's lien claim is filed. The Court there stated:

"This court is presented with a challenge to a previously unscathed creditors' remedy—the mechanics' lien. The test against which the validity of the lien must be measured and possibly the most concise statement of the weighing process referred to above, is set forth in *Boddie v. Connecticut,* 401 U.S. 371, 378-379, 91 S. Ct. 780. 786. 28 L. Ed. 2d 113 (1971):

What the Constitution does require is "an opportunity * * * granted at a meaningful time and in a meaningful manner," "for [a] hearing appropriate to the nature of

the case." The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short "within the limits of practicability," a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. (citations omitted) (emphasis added).

Whether the mechanics' and materialmen's lien withstands constitutional attack, then, is dependent upon two considerations: (1) whether the deprivation can be classified as "insignificant" or "de minimis": and, (2) whether the lien constitutes that "extraordinary situation . . . that justifies postponing the hearing until after the event."

In the view of this Court, the deprivation which results from the filing of a mechanics' lien is de minimis. The creditors' remedies thus far invalidated have completely, though temporarily, deprived the owner of the use of his property. *Snidach v. Family Finance Corp.,* 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (garnishment "freezes" wages and prevents their use by debtor): *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L. Ed. 2d 556 (1972) (writ of replevin authorizes sheriff to seize the property, depriving debtor of possession and use): *Hall v. Garson,* 468 F. 2d 845 (5th Cir. 1972) (landlords' lien allows landlord to seize tenants' personal property as security for rent payments): *Adams v. Egley,* 338 F. Supp. 614 (S. D. Cal. 1972) (self-help repossession remedies authorize creditor to peaceably seize collateral upon default in payments): *Straley v. Gassaway Motor*

Co., Inc., 359 F. Supp. 902 (U.S.D.C.S.W. Va. 1973) (garagemen's lien remedies allow repairmen to retain possession of an automobile pending payment or posting of bond by owner): *Lake Arrowhead Estates, Inc. v. Cumming*, 360 F. Supp. 1085 (U.S.D.C.Me. 1973) (prejudgment real property attachment remedies place the real estate "in custodia legis," in the custody of the court, preventing the transfer or encumbrance of the land). The mechanics' and materialmen's lien, however neither deprives the owner of the possession nor of the use of his property. Although the use of the property might be said to be curtailed, in that selling of the property, borrowing on the property, or renting the property may be more difficult or less profitable, the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with his property as he chooses. Although the value of the property may be diminished due to the existence of the lien two factors tend to mitigate that harm: (1) while the value of the property may be diminished by the amount of the lien the improvements, at least theoretically, have increased the value of the property by the amount of the lien, thereby minimizing harm to the owner: and, (2) the owner can force an expeditious adjudication on the merits, . . .

[3] The primary purpose of the mechanics' and materialmen's lien, of course, is to provide construction contractors with security. A secondary purpose, however, is to give notice to subsequent purchasers and encumbrancers that there is a charge on the property and that they will take subject to that charge. In that regard, it is similar to the lis pendens notice. In fact, the statute authorizing lis pendens notice refers to the notice of a mechanic's lien as a substitute for lis pendens notice in the applicable situation. S.D. Comp. L. Ann. 15-10-1 (1967). It is the purpose of lis pendens notice to inform purchasers and encumbrancers that there is pending litigation. Although the notice incidentally hampers use, it in no way prevents

sale, encumbrance or lease of the property, lis pendens notice exists, at least in part, as a matter of public policy in that it prevents multiplicity of litigation. The requiring of a hearing prior to the filing of lis pendens notice would destroy its effectiveness, since it would result in an interim period during which bona fide purchasers and encumbrancers could tie into the property, complicating the process of litigation and disappointing the expectations of the litigants. All of the above could also be said of the mechanics' and materialmen's lien. It is not meant to deprive the owner of possession, but to give interim protection to laborers and materialmen by giving notice of a change on the property. [Emphasis Added] *Cook* at 26-28."

In the case of *Connolly Development, Inc. vs. Superior Court of Merced County,* 553 P. 2d 637 (S. Ct. Calif. 1976) the Court used the following reasoning to find the California Mechanic's and Materialmen's Lien Law constitutional:

> No one questions that the imposition of such a lien deprives the owner of a property interest; the dispute turns on whether this is a significant deprivation.
>
> Pending trial of the suit to foreclose the lien, the landowner retains the possession, use, and enjoyment of his property. Subject to the lien, he may lawfully sell or encumber the property. In view of the owner's right to use and dispose of the realty, some courts have considered the deprivation of property occasioned by the recording of a mechanics' lien as de minimis, and hence unworthy of constitutional protection. [Citation Omitted]
>
> This protective policy continues to serve the needs of the construction industry. As was pointed out in *Cook v. Carlson, supra,* 364 F. Supp. 24, 29: "Labor and material contractors [in the construction industry] are in a particularly vulnerable position. Their credit risks are not as diffused as those of other creditors. They extend a bigger

block of credit, they have more riding on one transaction, and they have more people vitally dependent upon eventual payment. They have much more to lose in the event of default. There must be some procedure for the interim protection of contractors in this situation." Without such interim protection, the improvement may be completed, the loan funds disbursed, and the land sold before the claimant can obtain an adjudication on the merits of his claim.

In summary, we conclude that the recordation of a mechanics' lien, or filing of a stop notice, inflicts upon the owner only a minimal deprivation of property; that the laborer and materialman have an interest in the specific property subject to the lien since their work and materials have enhanced the value of that property; and that state policy strongly supports the preservation of laws which give the laborer and materialman security for their claims. In measuring these values, we do not deal in cold abstractions; we take into account the social effect of the liens and the interests of the workers and materialmen that the liens are designed to protect. We measure these valued interests against the loss, if any, caused to the owner. The balance tips in favor of the worker and the materialman; we conclude that the safeguards provided by California law to protect property owners against unjustified liens are sufficient to comply with due process requirements. We therefore uphold the constitutionality of the mechanics' lien and stop notice laws."

The case of *Carl A. Morse, Inc., vs. Rentar Industrial development Corp.,* 392 N.Y.S. 2d 425 (1977) found the New York Mechanics' and Materialmen's Lien statute constitutional in the following manner, to wit:

"It is in recognition of the foregoing minimal intrusion which results from the filing of a mechanic's lien that we conclude that due process of law in this context does not require prior notice or the opportunity to be heard, for,

as the Supreme Court noted in *Boddie v. Connecticut,* 401 U.S. 371, 378-79, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 "[w]hat the Constitution does require is * * * that an individual be given an opportunity for a hearing before he is deprived of any significant property interest" (accord *Fuentes v. Shevin,* 407 U.S. 67, 90, n. 21, 92S. Ct. 1983, 32 L. Ed. 2d 556, supra; *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349, supra [concurring op. per Harlan, J.]; emphasis supplied). We, however, are of the opinion that the filing of a mechanic's lien does not result in the deprivation of any "significant property interest" (accord *Spielman-Fond v. Hanson's,* 379 F. Supp. 997, affd. 417 U.S. 901, 94 S. CT. 2596, 41 L. Ed. 2d 208, supra; *Ruocco v. Brinker,* 380 F. Supp. 432, 436 [D.C., Fla., 1974, three-Judge court]; *Cook v. Carlson,* 364 F. Supp. 24 [D.C., S.D., 1973]; see *Brook Hollow Assoc. v. J.E. Greene, Inc.* 389 F. Supp. 1322 [D.C., Conn., 1975]; *Carl A. Morse, Inc.* at 429-30.

The case of *B&P Development Co. v. Walker* 420 F. Supp. 704 (D.C.W.D. Penn., 1976) found the Pennsylvania Mechanics' Lien Law valid as a matter of Federal Constitution Law citing with strong approval the *Spielman-Fond* case *supra.*

For the above reasons, the court concludes that it is bound to follow the summary affirmance of *Spielman.* Three other federal courts have also relied on the precedential value of *Spielman* in recent cases. In re Thomas A. Cary, Inc., 412 F. Supp. 667 (E.D. Va. May 7, 1976), upheld the Virginia Mechanics Lien Law. (see discussion of *Spielman* at pp. 670, 671). *Matter of Northwest Homes of Chehalis, Inc.,* 526 F. 2d 505 (9th Cir. 1975), upheld the Washington pre-judgment attachment statute. (see discussion of *Spielman* at p. 506). *In re the Oronoka,* 393 F. Supp. 1311 (N.D. Me. 1975) upheld Maine's real estate attachment lien statute (see discussion of *Spielman* at pp. 1316, 17). *B&P Development Co.* at

708.

The Case of *Bankers Trust Company vs. El Paso Pre-Cast Company* 560 P. 2d 457 (S. Ct., Colo., 1977) found the Colorado mechanics' and materialmen's Lien Law constitutional by stating as follows, to wit:

> The Supreme Court has spoken only indirectly on mechanics' liens by its summary affirmance of *Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Aris. 1973), aff'd, 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed. 2d 208. A summary affirmance is, nonetheless, a decision on the merits, having precedential value. *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L. Ed. 2d 223. Indeed, several lower federal courts have given great weight to the affirmance of *Spielman-Fond. Matter of Northwest Homes of Chehalis, Inc.*, 526 F. 2d 505 (9th Cir. 1975) cert. denied, 425 U.S. 907, 96 S. Ct. 1501, 47 L. Ed. 2d 758; *In re Thomas A. Cary, Inc.*, 412 F. Supp. 667 (E.D. Va. 1976); *Brook Hollow Associates v. J.E. Greene, Inc.*, 389 F. Supp. 1322 (D. Conn), vacated, 535 F. 2d 1240 (2d Cir. 1975).
>
> We therefore regard the holding of *Spielman-Fond, supra,* as especially instructive. In considering whether the filing of a mechanics' lien against real property constituted a taking of a significant property interest, . . .
>
> * * *
>
> For these reasons, the court found no deprivation of constitutional dimensions and thus no due process violation. We agree with the rationale of that case.
>
> * * *
>
> To require the full panoply of due process protections before filing a lien statement would impair the notice function of the lien statements. In the interval between the time of the work, the furnishing of materials or ser-

> vices giving rise to the lien claim and the hearing on the lien, prospective purchasers would have no notice of the potential lien. The very "deprivation" complained of by *Bankers,* the difficulty in alienating property against which a lien has been filed, indicates the effectiveness and importance of the notice function of lien statements. *Bankers* at 461-62.

The case of *Weather Engineering and Manufacturing, Inc., vs. Pinon Springs Condominium Inc.,* 563 P. 2d. 346 (S. Ct., Colo., 1977) reaffirmed *Bankers Trust Company, supra* in this statement.

> Dovenmuehle argues next that Colorado's mechanics' lien statutes deny construction lenders due process of law. This assertion of unconstitutionality was rejected in *Bankers Trust Company v. El Paso Pre-Cast Co., supra,* and we decline to reconsider it here.

The reasonings presented in the above decisions from other jurisdictions is sound. In the interest of fairness and justice these decisions should be followed by this Court.

II. A finding today that the Oklahoma Mechanics' Lien Law is unconstitutional will necessitate a finding tomorrow that the long established doctrine of *Lis Pendens:* The Oklahoma Tax Lien Statutes: and numerous other well established laws of Oklahoma are unconstitutional.

It is hereby submitted that a finding of this Court that the Oklahoma Mechanics' Lien Statutes are unconstitutional will necessitate a finding in the future for the same reasons, that the doctrine of *Lis Pendens;* the Oklahoma Tax Lien Statutes and numerous other long established laws of the State of Oklahoma and the Nation are unconstitutional.

Lis Pendens is an ancient doctrine formulated by Sir Francis Bacon in 1618 as the 12th of his "Ordinances in Chancery." It

has been said that the doctrine of *Lis Pendens* is older in law than in equity, and was adopted from the common law court in Analogy to the rule existing in real actions to the effect that, if "defendant aliens after pendenancy of the writ, the judgment in the action will overrule such alienation." 54 CJS *Lis Pendens,* §1 (at p. 571). Oklahoma Lien Statutes have been likened to the notice of *Lis Pendens. Sawyer v. Schick* 120 P. 581 (S.Ct. Ok., 1911). The Oklahoma Law on *Lis Pendens* is contained in 12 O.S. §180 et seq. 12 O.S. §180 states:

> When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title; but such notice shall be of no avail unless the summons be served or the first publication made within sixty days after the filing of the petition.

12 O.S. §180.1 states:

> No action pending in either a State or Federal Court shall constitute notice with respect to any real property situated outside of the county in which said action is on file until such time as a notice of the filing of such action identifying the case and the Court in which it is pending and describing the land affected by the action, is filed in the office of the County Clerk where said land is situated.

68 O.S. §230 et seq., contain provisions for State Tax Liens against real property in the State of Oklahoma. No provisions for notice or opportunity to be heard by a landowner before a lien attaches is contained in these sections. Further numerous other liens, which have been long engrained in Oklahoma Law require no notice or opportunity to be heard. Eg. Attorney's Lien 5 O.S. §6.

If appellees are correct and the Oklahoma Lien Law is un-

constitutional because no notice and opportunity to be heard is allowed a landowner before a laborer can file a Mechanics' Lien, it is obvious the above stated liens regarding Lis Pendens, Tax Liens, and numerous other liens are objectionable for the same reasons. Plaintiff, Appellant herein, submits that "due process of law" as contained in the Constitution of the United States was never meant to be interpreted in such a way as to frustrate the laws which Appellees now would have struck down.

In view of the foregoing it is clear that the Oklahoma Mechanics' Lien laws are constitutional and do not violate the due process provisions of the Constitution. Therefore, Appellees' Motion for Summary Judgment should have been denied by the Court below. Further, pursuant to Rule 13 of the District Court Rules since "no substantial controversy as to any material fact" remains for trial, Appellant's Motion for Summary Judgment should be sustained.

S/S Wesley R. Thompson

Wesley R. Thompson, Attorney
for Appellant.
P.O. Box 1364
Sapulpa, Oklahoma 74066

APPENDIX I

No. 51141

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
Supreme Court
State of Oklahoma
DEC 27, 1977
Ross N. Lillard. Jr.
Clerk

MOBILE COMPONENTS, INC., a corporation
Appellee

VERSUS

VERLEE C. LAYON, Executrix of the Estate of: THOMAS LAYON, SR., Deceased;
Appellant

PLANNED RESIDENTIAL COMMUNITIES CONSTRUCTION COMPANY OF OKLAHOMA, INC., et al.
Appellees

Consolidated With

VERLEE C. LAYON, Executrix of the Estate of: THOMAS LAYON, SR., Deceased.
Appellant

VERSUS

FIRST NATIONAL BANK OF TULSA, et al.
Appellees

APPELLEES' ANSWER BRIEF

STATEMENT OF CASE

This is the Answer Brief of Appellees, The Outrigger, Inc. and First National Bank of Tulsa, Defendants below in Tulsa County District Court Case No. C-75-1071. Appellant, Verlee C. Layon, Executrix of the Estate of Thomas Layon, Sr., Deceased, Plaintiff below in said case, appeals from a ruling by the Honorable William W. Means, entered in the consolidated cases No. C-75-1071 and C-75-1960, holding that the mechanics' and materialmen's lien laws of the State of Oklahoma are unconstitutional, and thereby dismissing Appellant's action to foreclose a lien filed against certain property in Tulsa County owned by Appellee Outrigger. The single and exclusive issue presented to this Court is strictly a question of law, that being the constitutional validity of Oklahoma's mechanics' and materialmen's lien statutes. The facts of this case are therefore of secondary importance, but are useful in developing the setting in which this crucial issue arises. Appellees' Statement of the Case does not differ in any substantial respect from the Statement of Facts set forth in Appellant's Brief, with but one exception.

On July 17, 1974, Century Interiors, Inc. filed mechanics' lien number 61251 with the Court Clerk in Tulsa County, claiming a materialmen's lien in the amount of $17,115.37 against two separate properties identified in the lien statement by street address and legal description, respectively. This lien, while referred to in many pleadings by reference, was never filed in the foreclosure action originated by the Plaintiff. It therefore does not appear in the record on appeal, but is, of course, a matter of public record on file with the Court Clerk of Tulsa County. In said lien statement, Century Interiors first claims that it furnished materials and performed work at "8805 S. Lewis, Tulsa, Oklahoma." Elsewhere in the same lien statement, Century describes the

property upon which work was performed as "all of Lot one (1), Block one (1), CROWN IMPERIAL SECOND ADDITION, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof."

As Appellant points out in her Statement of Facts, this lien statement refers to work performed on two separate tracts of land, both of which were owned by Lewis Avenue Investment Company at the time the work was performed. The legal description set out above accurately describes an apartment project located in Broken Arrow upon which work was performed. The street address in the City of Tulsa, however, although referring in fact to property in which Lewis Investment had some interest, incorrectly identified the actual property on which work was being performed. The correct address of the property on which Century had performed work was *8600* South Lewis and Delaware Streets, as correctly stated in the written contract which Century executed with Commercial Interiors, appearing as Contract 'E' attached to Plaintiff's first foreclosure petition (R. 183-196).

In September, 1974, Appellee Outrigger acquired title to the apartment project in the City of Tulsa, described as "Lots One (1) and Two (2), Block Three (3), *CROWN IMPERIAL ADDITION to the City of Tulsa,"* or as referred to above, 8600 South Lewis and Delaware Streets. Simultaneously, Appellee First National Bank took a mortgage covering this same property.

Century filed an assignment of its lien No. 61251, purporting to transfer its interest to Appellant's decedent on December 4, 1974. On April 22, 1975, Appellant's decedent filed his Petition in Case No. C-75-1071 seeking to foreclose the lien which he claimed on the properties located in both Tulsa and Broken Arrow (R. 183-196). On May 20, 1975, Appellant's decedent ob-

tained leave of court to amend his original lien statement to include the correct legal description of both tracts of property upon which the lien was being claimed. (R. 206-210). Thus, Appellant's decedent changed the original lien statement to refer to the correct legal description of the property located in the City of Tulsa, as opposed to the incorrect street address which had previously appeared in the original statement, thereby giving Appellees their first actual and constructive notice that an adverse interest was being claimed against Appellees' property, a claim which clearly did not appear in the public record when Appellees acquired their interests in September of 1974.

On March 30, 1976, the Court ordered that the action commenced by Appellant's decedent be consolidated with Tulsa County District Court Case No. C-75-1960 (R. 341-342), a lien foreclosure action filed on August 7, 1975 by Appellee Mobile Components, Inc. against the Broken Arrow property (R. 1-10). Layon, the originally named Plaintiff in Case No. C-75-1071, subsequently died, and his Executrix was substituted as the named Plaintiff below and Appellant herein (R. 415). Shortly thereafter, Appellees Outrigger and First National Bank filed their Motion for Summary Judgment in Case No. C-75-1071 asking that Appellant's case be dismissed on grounds that the mechanics' and materialmen's lien statutes are unconstitutional (R. 372-374; 377-386). The Motion was sustained on May 31, 1977, and the Court's Order was subsequently entered on July 18, 1977 (R. 427-428), after which Appellant perfected his appeal.

ARGUMENT AND AUTHORITIES

PROPOSITION

THE MECHANICS' AND MATERIALMEN'S LIEN LAWS OF THE STATE OF OKLAHOMA VIOLATE BOTH THE

STATE AND FEDERAL CONSTITUTIONS BY DEPRIVING PERSONS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The mechanics' and materialmen's lien laws fail to provide for any type of timely notice or hearing on the probable merits of the claim against the owner's property, or for any judicial participation at an early stage of the proceedings, or for any type of bond or security to protect the owner against a wrongful taking.

An appropriate starting point is the statutory scheme provided in the Oklahoma Statutes which allows certain persons to file liens against real property for work performed thereon. See generally Title 42, Oklahoma Statutes, 1971, the pertinent sections of which are set forth below as they existed at the time this action arose, and prior to the amendments added in 1977:

"§141. Right to lien-Priority-Enforceability against property-Constructive notice

Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material for the erection, alteration or repair of any building, improvement or structure thereon or perform labor in putting up any fixtures, machinery in, or attachment to, any such building, structure or improvements . . . shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances . . . Such liens shall be preferred to all other liens or encumbrances which may attach to or upon such land, buildings or improvements or either of them subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, . . . or the making of any such repairs or improvements; and such lien shall follow said property and each and every part thereof, and be enforceable against the said property wherever the same may be found, and compliance

with the provisions of this Article shall constitute constructive notice of the claimant's lien to all purchasers and encumbrancers of said property or any part thereof, subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor.

"§142. Statement to be filed

Any person claiming a lien as aforesaid shall file in the office of the clerk of the district court of the county in which the land is situated a statement setting forth the amount claimed and the items thereof as nearly as practicable, the names of the owner, the contractor, the claimant, and a description of the property subject to the lien, verified by affidavit . . . Such statement shall be filed within four months after the date upon which material was last furnished or labor last performed under contract as aforesaid . . .

"§143. Lien by or through subcontractor

Any person who shall furnish any such material or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, or improvements, or both from the same time, in the same manner, and to the same extent as the original contractor for the amount due him for such material and labor . . . by filing with the clerk of the district court of the county in which the land is situated, within ninety (90) days after the date upon which material was last furnished or labor last performed under such sub-contract, a statement, verified by affidavit, setting forth [same as in §142] and by serving a notice in writing of the filing of such lien upon the owner of the land, or improvements, or both. . . ."

* * *

"§147. Discharge of lien

Any person against whom a claim is filed under the

provisions of the law relating to mechanics' and materialmen's liens may at any time upon three (3) days notice in writing to the claimant discharge such lien by depositing with the Court Clerk in whose office such lien claim has been filed the amount of such claim in cash and executing and filing with such Court Clerk a good and sufficient bond to the claim and with adequate, solvent sureties conditioned that such person will pay any reasonable attorney's fee and all court costs, and interest, that may be adjudged against him finally by any Court of competent jurisdiction in the event such claimant recovers judgment on such claim in the amount for which such claim is filed; Provided, the deposit of such cash and the execution and filing of such bond shall not operate to discharge such lien until the expiration of five (5) days after the deposit of such cash and the filing of such bond, during which time the lien claimant may apply to such Clerk to have the surety on such bond increased, and if upon such investigation the bond proves to be insufficient the Clerk shall immediately require such additional surety thereon as may be necessary to make such bond solvent, and the lien shall not be discharged until any additional surety ordered shall have been given and approved."

* * *

"§172. Enforcement by Civil action-Limitations-Practice, pleading and proceeding-Amendment of lien statement

Any lien provided for by this Chapter may be enforced by civil action in the District Court of the County in which the land is situated, and such action shall be brought within one year from the time of the filing of said lien with the Clerk of said Court . . . [I]n case of action brought, any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed.

* * *

"§175. Sale of property after judgment

In all cases where judgment may be rendered in favor of any person or persons to enforce a lien under the provisions of this Chapter, the real estate or other property shall be ordered to be sold as in other cases of sales of real estate, such sales to be without prejudice to the rights of any prior incumbrancer, owner or other person not a party to the action.

* * *

"§177. Suite by owner to determine lien and cancelation of lein on docket

If any lien shall be filed under the provisions of this Chapter, and no action to foreclose such lien shall have been commenced, the owner of the land may file his petition in the district court of the county in which said land is situated, making said lien claimants defendants therein, and praying for an adjudication of said lien so claimed, and if such lien claimant shall fail to establish his lien, the court may tax against said claimant the whole, or such portion of the costs of such action as may be just: Provided, that if no action to foreclose or adjudicate any lien filed under the provisions of this chapter shall be instituted within one year from the filing of said lien, the clerk of the district court shall enter under the head of "Remarks," in the mechanics' lien docket hereinbefore named, that said lien is canceled by limitation of law."

Appellees assert that the statutory scheme described above unequivocally violates the traditional and well-recognized standards of due process which have been enunciated by the Supreme Court of the United States in construing and applying the Fourteenth Amendment. The same basic guarantees of due process of law are guaranteed to the citizens and residents of Oklahoma by Article II, Section 7 of the Constitution of the State of Oklahoma. A discussion of due process requirements

under the Fourteenth Amendment must necessarily begin with the landmark case of *Snidach v. Family Finance Corp.*, 395 US 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). The Supreme Court there ruled unconstitutional a Wisconsin prejudgment garnishment statute which permitted a creditor, without notice or prior hearing, to freeze the wages of an alleged debtor, although the creditor had no prior interest in the wages. It is significant to observe that the Court Clerk, under the Wisconsin Law, issued the summons at the request of the creditor's attorney, without any judicial participation. The court concluded that because no extraordinary circumstances justified the statutory scheme, absent *notice* and a *prior hearing*, the prejudgment garnishment procedure violated the fundamental principles of due process.

Three years later, in the case of *Fuentes v. Shevin*, 407 US 67, 92 S. Ct. 1983, 32 L.Ed. 2d 556 (1972), the Supreme Court invalidated prejudgment replevin statutes in Florida and Pennsylvania. The court characterized the statutes as authorizing issuance of writs ordering state agents to seize a person's possessions simply upon the ex parte application of any other person who claims a right in the property, conditioned only upon posting a security bond. No state official participated in the decision to seek a writ; no state offical reviewed the basis for the claim to repossession; and no state official evaluated the need for immediate seizure. Neither statute provided for notice to be given to the possessor of the property, and neither statute gave the possessor an opportunity to challenge the seizure at any kind of prior hearing. The court was not persuaded by arguments that the deprivation was temporary, or that the goods involved were not important or necessary, as were the wages involved in *Snidach*. In striking down the statutes, the court concluded that the prejudgment replevin provisions under consideration worked a deprivation of property without due process of law in-

sofar as they denied the right to a prior opportunity to be heard before chattels were taken from their possessor. In quoting from *Snidach,* it stated that due process is afforded only by the kinds of *notice* and *hearing* that are aimed at establishing the validity, or at least the *probable validity,* of the underlying claim against the alleged debtor *before* he can be deprived of his property.

Two years later, the court again was presented with the opportunity to reconcile a creditor's statutory remedies under state law with the due process clause contained in the Fourteenth Amendment. In *Mitchell v. W. T. Grant Company,* 416 US 600, 94 S. Ct. 1895, 40 L.Ed. 2d 406 (1974), the court appeared to limit the scope of its earlier decision in *Fuentes* in upholding a Louisiana statute allowing prejudgment sequestration of personal property, a procedure which apparently resembles an action in replevin or prejudgment attachment. Grant had sold household appliances to Mitchell under an installment sales contract which gave Grant a vendor's lien in the consumer goods. When Mitchell failed to make installment payments, Grant seized the appliances after obtaining a writ of sequestration from state court. Under the Louisiana law, a writ could issue on an ex parte judicial determination, without the necessity of giving prior notice or opportunity for hearing before seizure. The creditor had to accompany his complaint with an affidavit specifying the facts he asserted in support of his claim, and not merely conclusory allegations of ownership or rights in the property. The person who examined the sufficiency of the affidavit and issued the writ was a judge, rather than a court functionary. The creditor was required to file a bond as a condition for obtaining the writ in order to compensate or protect the debtor for any damages he might suffer as a result of unjustified sequestration. The law further permited the debtor to obtain a

prompt post-seizure hearing on the issue of possession, wherein if the creditor failed to present sufficient proof of his claim, the court could restore possession to the debtor, and award him damages and attorney's fees. Regardless of whether the debtor moved to dissolve the writ, he could regain possession of the property by filing a bond to protect the creditor.

In analyzing the due process clause, the Court went on to observe that the pre-*Snidach* and *Fuentes* decisions stood for the proposition that a hearing must be had before one is finally deprived of his property and did not deal at all with the need for a pre-termination hearing where a full and immediate post-termination hearing is provided. In contending that *Snidach* and *Fuentes* did not constitute a wholesale upheaval of previously established due process requirements, the court distinguished *Snidach* on grounds that it "involved the prejudgment garnishment of wages—'a specialized type of property presenting distinct problems in our economic system' " (416 US 614). It went on to distinguish *Fuentes* on grounds that the Florida and Pennsylvania statutes permitted the secured installment seller to repossess the goods sold without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. The court appeared "convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case" (416 US 615). In expounding upon this conclusion, Mr. Justice White explained that the Louisiana statute narrowly limited the grounds upon which the writ may be issued; required bonding by the creditor and judicial examination of the application for the writ; provided for a prompt post-lien hearing; and granted the debtor a cause of ac-

tion for wrongful seizure, all of which safeguards were absent in the statutes under examination in *Fuentes*. (It is significant to note that four members of the court dissented on grounds that *Fuentes* was not distinguishable, but rather required that the Louisiana statute be voided as unconstitutional.)

Whatever comfort *Mitchell* may have given to those who seeked to denigrate the importance and significance of *Fuentes*, the Supreme Court most recently returned to the *Fuentes* rationale to justify the death sentence it handed to a Georgia statute allowing prejudgment garnishment. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 US 601, 95 S. Ct. 719, 42 L.Ed. 2d 751 (1975), the Supreme Court overturned, as contrary to due process, a Georgia statute authorizing prejudgment garnishment in a case in which a commercial bank account had been frozen. Under the Georgian law there were only two prerequisites to obtaining garnishments: (1) the creditor or his attorney had to execute an affidavit before a court clerk stating the amount claimed to be owed and that he had some reason to apprehend the loss of all or some of the debt unless the writ was issued; and (2) the creditor had to file a bond equal to twice the amount claimed to protect the debtor. The statute, however, did permit the debtor to dissolve the garnishment by filing a bond. In discussing the relevance of the *Mitchell* decision to the Georgia statute then before the court, Mr. Justice White, again writing for the majority, stated:

> "The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. . . . The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, with-

> out participation of a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizeable bank account was frozen, and the only method discernable on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be." *North Georgia Finishing,* supra. 419 US 607.

A thorough study and analysis of these four cases clearly delineates what is constitutionally permissible under the due process clause of the Fourteenth Amendment. On the basis of *Snidach, Fuentes,* and *North Georgia Finishing, Inc.,* in the absence of extraordinary circumstances, before a debtor may be made to suffer a prejudgment taking of a significant property interest, a creditor must provide him with *prior notice* of the creditor's claim, *and a prior hearing* on the probable merits of the creditor's claim. In the alternative, in the absence of prior notice and hearing before seizure, *Mitchell* requires that if an ex parte order is to be issued, there must be *judicial participation;* any such order may issue only upon the sworn *affidavit* of the creditor, wherein *specific facts* are alleged, showing the creditor's prima facie right to possession, and not merely conclusory statements by the creditor; there must be provisions for a *prompt post-seizure hearing* wherein the debtor may require the creditor to present evidence at an adversary hearing regarding the creditor's probable right to possession; the *creditor must,* in addition, *post sufficient bond to protect the debtor* against any damages he might suffer as a result of a wrongful taking of the debtor's property; and there must be a means by which the *debtor can regain* temporary *possession* of his prop-

erty pending a final hearing on the merits. Laying these alternative schemes along side the mechanics' and materialmen's lien laws of Oklahoma, the failure of the Oklahoma statutes to satisfy either approach becomes so immediately obvious that one can only wonder how these lien laws have survived so long. Indeed, it would appear that the statutory scheme in Oklahoma has taken the worst aspects from either alternative approach, and combined them into a single "perfect example" of a deprivation of due process of law under the Fourteenth Amendment.

The most glaring fact about the Oklahoma scheme is its failure to provide for notice or opportunity to be heard *prior* to the time the lien attaches. To be sure, the general contractor has no obligation whatsoever to ever provide notice that the subject property has been encumbered with a lien until such time as the lien claimant chooses to file suit in district court to foreclose his lien. Although some provision is made to require subcontractors to furnish notice, such notice is required to be served only *after* the lien has already attached. As if this were not enough to invalidate the Oklahoma statutes, the statutory provisions go further so that there will be no doubt but that the entire scheme becomes totally repugnant to the notions of fair play incorporated in the Fourteenth Amendment. As noted earlier, the lien is filed with the Court Clerk of the County in which the property is situated, without the slightest hint of any judicial participation. In fact, the mere filing of a statement with the Court Clerk by the lien claimant does not even rise to the level of an ex parte proceeding. The statement which the claimant is required to file, although verified by affidavit, must contain only the names of the owner, contractor and claimant, the amount claimed, the items furnished and a description of the property which is subject to the lien. Such a statement is clearly distinguishable from that upheld in *Mitchell,* where the

creditor's affidavit or verification was attached to a Petition alleging facts supporting his application for a writ of sequestration. Indeed, in Oklahoma, the standard practice is merely to complete a few blanks on a pre-printed form.

The Oklahoma provisions further offend and violate standards of due process by failing to provide in any respect for a prompt post-seizure hearing on the validity of the contractor's claim. A lien claimant may continue to cloud the title for a year following the filing of his statement. A year can scarcely be considered "prompt" by any measure. It is true that an action may be brought during that time to seek cancellation of the lien. However, this provision in the statutes is rendered meaningless by the fact that the property owner may never have notice that any lien has been filed against his property since a contractor is not compelled to furnish any notice to him prior to, or even after, filing his lien. Moreover, the lien statment may be amended, except as to amount, at any time after the action to foreclose is begun, and thus the claimant may expand or modify the property description in the statement to include property not previously identified in the statement, thereby giving the claimant a new claim over previously unencumbered land, but with the benefit of the file date which appears on the statement when it was first filed. One taking an interest in the property which previously did not appear as a matter of record to be encumbered now suddenly finds his title threatened to be subordinated to a lien which he never knew existed until the statement was amended. Oklahoma provisions further fail to comply with *Mitchell* in that the lien claimant does *not* have to post any type of bond, security or other legal devise which would afford protection against any damages which might result due to wrongful attachment.

Finally, although the statutory scheme in Oklahoma "gen-

erously" provides that a lien may be discharged by filing with the Court Clerk the amount which the lien claimant alleges is due and owing to him, that deposit must be in *cash,* for the full amount of the claim, accompanied by a security bond to protect the *creditor* against attorney's fees, costs and interest in the event said creditor should prevail at a trial on the merits. A scheme whereby the *debtor* is required to post a bond for the protection of the *creditor,* but the creditor has no reciprocal requirement to secure the debtor against any damages, epitomizes the lack of fair play and due process which is so pervasive in the Oklahoma lien laws. Moreover, if the bond posted is objected to by the creditor as being insufficient, it is the *Court Clerk* who determines the merits of the creditor's objections, after which the Clerk may unilaterally require the debtor to increase the amount of his bond. If nothing else, the Oklahoma statutory scheme deserves high marks for its consistency in excluding judicial participation at any stage of these proceedings.

The conclusions which the Appellees now urge upon this Court rest soundly on judicial precedent which is so closely aligned to the facts now before the Court as to compel affirmance of the District Court's ruling. In *Barry Properties, Inc. v. Flick Brothers Roofing Co.,* 353 A.2d 222 (Md. 1976), following what it considered to be the teachings of *Snidach, Fuentes, Mitchell* and *North Georgia Finishing,* the Maryland court struck down a materialmen's and mechanics' lien law which was so similar to the scheme in Oklahoma as to be virtually indistinguishable. In an opinion which dealt in depth and at length with the issues placed before it, the Court reasoned:

> "As already indicated, a Maryland mechanics' lien is a statutory prejudgment creditor remedy which at least temporarily deprives the owner of a significant property interest. The lien is created as soon as work is performed

or materials are supplied, with no requirement of prior notice to the owner. When the claimant is a subcontractor, as is the appellee here, it must, within 90 days of furnishing labor or materials, provide the owner with notice of an intent to make a lien claim. A subcontractor may file his claim with the clerk of the court before he provides the owner with notice of intent to claim a lien, [citation omitted], or the subcontractor may not actually file the lien for as long as 180 days after he gave notice of intent to do so. Consequently, notice of intent to claim a lien, which is the only "notice" the owner is required to receive prior to being made aware of a suit to enforce the claim, is not, in our judgment, adequate. The filing of a claim to a lien, although recorded, also does not give the property owner constructive notice of the lien. [citation omitted.] There is no provision requiring any hearing concerning the lien prior to the filing of a suit to enforce it. The statute is the same with respect to general contractors, except that they need not even provide notice of intent to claim a lien. In short, the Maryland mechanics' lien law permits an owner to be deprived of a significant property interest without notice or a prior hearing, and thus is unconstitutional unless it provides protections such as those discussed in *Mitchell* and *North Georgia Finishing* or it is deemed to be within the "extraordinary circumstances" exception.

. . . Maryland mechanics' liens come into existence upon the furnishing of labor or materials. There is no requirement, as demanded by *Mitchell* and *North Georgia Finishing* that the creditor provide a sworn affidavit on personal knowledge setting forth the facts on which the lien is based, file a bond to protect the debtor, submit the lien to preliminary judicial scrutiny or that the debtor be granted an opportunity for a prompt postseizure hearing. Even when the lien is filed it is simply presented to a clerk of the court for recordation, without any requirement that it be accompanied by an affidavit or bond or

> subject to prior judicial participation. While a property owner 'may bring proceedings in equity to compel the claimant to prove the validity of [a lien that has been claimed] or have it declared void, . . . and might be able to seek a declaratory judgment that the lien is invalid, . . . he is not thereby legally entitled to an immediate hearing as contemplated by the two Supreme Court cases, but only to a hearing in the ordinary course of administering the court's trial assignment calendar.' " *Barry Properties, Inc.*, supra, 353 A.2d 231-232.

No less compelling is the opinion by the Supreme Court of Connecticut in *Roundhouse Construction Corp. v. Telesco Masons Supplies Company, Inc.*, 362 A.2d 778 (Conn. 1975), *vacated and remanded for determination whether the decision rests on an independent state ground*, 423 US 809, 96 S. Ct. 20, 46 L.Ed. 2d 29 (1975), *reaffirmed on both state and federal grounds*, 365 A.2d 393 (Conn. 1976). After giving due consideration to *Snidach* and its progeny, the Court concluded:

> "The general requirements . . . appear from an analysis of these cases, and it is clear that the present Connecticut mechanic's lien procedures do not meet those requirements of constitutional due process. Under Connecticut procedure, the party claiming a lien is not required to post any bond or provide any surety to protect the owner of the property subjected to the lien against damages from an unsupportable lien. [citations omitted]. The filing and perfection of the lien may be done by a claimant entirely ex parte, without authorization, supervision or control by a judicial officer. [citation omitted.] The certificate itself, which is recorded in the town clerk's office, is statutorily required to contain only a description of the subject premises, the date work was commenced, the amount claimed, and a statement that the amount claimed is justly due. [citation omitted]. Such a certificate is a conclusory statement, totally devoid of any substantive underlying facts. [citation omitted].

> Most conspicuously absent from the Connecticut procedure is any provision whatsoever for any sort of a timely hearing, either before or after the recordation of the lien, which would give the property owner an opportunity to be heard or require the lienor to justify his lien. . . . The provision . . . for the dissolution of a mechanic's lien upon the substitution of a bond does not afford adequate relief, since the authority of the court is limited to the issuance of an order dissolving the lien only upon the substitution of a bond in "such amount as a court of competent jurisdiction may adjudge to have been secured by such lien." In such a proceeding "[t]he office of the judge before whom the application is pending is to discover the amount of the Plaintiff's apparent claim, and not to pass upon its legal validity or to weigh the chances of recovery upon it." [citation omitted]. *Roundhouse Construction Corp.*, supra, 362 A.2d 783-784.

A closer reading of both the Maryland and Connecticut opinions, in which the respective statutes are discussed in detail, reveals that in some respects these two schemes, which were struck down as being violative of the due process clause, offer the debtor or property owner some protection or advantages which are not present in the Oklahoma provisions. For example, under Maryland law, the lien claimant must give *notice for an intent* to file a lien within a specified period of time after he ceases furnishing materials, after which he is afforded a second period of time in which to actually file his lien statement. Although the Maryland court found notice under these facts to be insufficient, there is no doubt but that the requirement to file a notice of intent gives the Maryland scheme more redeeming characteristics than are found in the Oklahoma statutes. Similarly, under the provisions of the Connecticut mechanics' lien laws, the claimant is given a shorter period of time (60 days) in which to file and perfect his lien. In Oklahoma, as discussed

earlier, the claimant can prolong the cloud on the owner's title for a period of ninety (90) or one hundred twenty (120) days before he assumes any burden to perfect his claim as a matter of record. *A fortiori,* the Oklahoma statutes must be relegated to last place in the race to satisfy the due process requirements of the Fourteenth Amendment.

Of the utmost significance is the conclusion reached by the Maryland court in the *Barry Properties* case:

> "We therefore hold that under the current statute there *can be no existing lien* on property, *until and unless* the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding providing *notice* and a *hearing* (i.e., a declaratory judgment). *What the claimant,* be he a general contractor or subcontractor, *possesses up to that point in time is a chose in action.* Under this ruling, we believe, the statute continues to effectuate the primary legislative intent, yet the owner is not deprived of a significant property interest without due process since the owner's interest is not impinged upon until *after* he is provided with notice and an opportunity for a hearing." (emphasis added) *Barry Properties, Inc.,* supra, 352 A.2d 235.

This quote is the essence of Appellees' position, and manifests the precise result which must be reached in the case at bar. The mechanics' and materialmen's lien laws of Oklahoma are unconstitutional because they deprive the property owner of due process of law under the Fourteenth Amendment of the United States Constitution, as well as the due process clause of the Oklahoma Constitution. The Order of the District Court sustaining Appellees' Motion for Summary Judgment should therefore be affirmed.

B. Mechanics' and materialmen's lien laws involve "State action," and must therefore comply with due process

requirements of the State and Federal Constitutions.

It is elementary that before the due process clause of the United States Constitution can be invoked, there must be a showing of "State action" since private action, however obtrusive, is not forbidden by the Fourteenth Amendment. *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 95 Sup. Ct. 499, 42 L.Ed.2d 477 (1974). Similarly, this court has interpreted the due process clause of the Oklahoma Constitution (Article II §7) as intending to protect citizens from arbitrary and unreasonable action by the State, *City of Edmond v. Wakefield,* 537 P.2d 1211 (Okla. 1975). Appellees submit that there is no doubt but that these lien laws involve "State action."

In deciding this very issue regarding the constitutionality of mechanics' and materialmen's lien laws, at least two Courts have explicitly discussed the concept of "State action": *Connolly Development, Inc. v. Superior Court of Merced County,* 553 P.2d 637 (Cal. 1976) and *Barry Properties, Inc. v. Flick Brothers Roofing Co.,* 353 A.2d 222 (Md. 1976). The rationale for finding State action is best summarized in the *Connolly Development* case, which Appellant cites in support of her position on page 6 of her Brief in Chief:

> "There is no question but that the mechanics' lien involves significant state action. Not only is the lien governed by detailed statutory provisions, but it becomes effective only upon recordation with the county recorder, an official of the state; moreover, it can be enforced only by resort to the state courts." *Connolly Development, Inc.,* supra, 553 P.2d. 645.

This summary statement applies with equal force to the case at bar. In Oklahoma, as discussed previously, these liens are governed by detailed statutory provisions, and are only recognized after a statement is filed with the Court Clerk, an admitted official of the State. Furthermore, these liens may only

be enforced by foreclosure proceedings, filed in accordance with specific provisions of the mechanics' lien statutes, subject at all times to the control of State courts.

This Court has recently discussed constitutional challenges to creditor's remedies vis-a-vis the State action requirement in *Helfinstine v. Martin,* 561 P.2d 951 (Okla. 1977) and *Hitchcock v. Allison, d/b/a Prairie View Mobile Home Park,* 48 OBAJ 2573 (1977). Both of these cases, holding that State action was not involved in 12A O.S. §9-503 (1971) (UCC self help repossession) and 41 O.S. §42 (1973) (landlord's lien), respectively, are distinguishable from the case at bar. In the *Hitchcock* case, at 48 OBAJ 2576, this Court stated:

> "We think that merely because a state legalizes certain action does not necessarily signal that the state itself has become a participant. . . .
>
> We note that the statute in question creates only the right to act; it does not require that such action be taken. Appellee's exercise of the choice allowed under the statutes, where the initiative comes from them and not the state, does not make their actions in doing so "state action" for the purposes of the Fourteenth Amendment."

In the case of self help repossession under the UCC, the statute merely allows the creditor to peaceably repossess property from the debtor, in which property the creditor has a security interest by virtue of a contractual agreement to which both parties were signatory. As the Court observes, there is no requirement that repossession be accomplished in this manner, but the statute recognizes the rights of the parties to this type of "self help remedy," since it is the result of a pre-existing contractual agreement, it can be done peaceably, the remedy has deep roots in the common law, and no State official is involved in the repossession. Likewise, in the case involving the landlord's lien,

the statute merely permits the landlord to secure his right to receive rent due from the tenant by retaining property belonging to the tenant which is already in the possession of the landlord. The landlord is not required to act in this manner, but merely is permitted to do so if he should so choose; the possession is peaceful; and there are no State officials involved in the taking of the property. Furthermore, in each of these cases, although not technically a matter of "State action," the debtor has actual notice of the creditor's claim and is properly advised of the potential risk of losing his property since, on the one hand, the parties expressly agreed to the repossession in the event of default, and on the other hand, the property is placed on premises which allows the creditor (landlord) to exert possession and control over the property. It is quite clear, therefore, that in both instances, the parties are virtually left alone to work out their private matters, without interference or regulation by the State.

In the case at bar, however, if a contractor is to perfect the security interest he claims in material which he has furnished, or labor which he has performed on a given piece of property, he *must* file with the Court Clerk a statement setting out precise and detailed information required by *State statutes;* the statement *must* be verified by affidavit, as required *by statute;* it *must* be filed within a specified period of time, as set forth *by statute;* the claim becomes a matter of public record, and by virtue of *statutory provisions* is afforded priority over other liens or encumbrances attaching to the same property; and the claim *must* be foreclosed by filing suit in the District Court, in the same manner as other foreclosure actions, as provided by *State statute.* There is little doubt but that mechanics' and materialmen's liens are *not* merely the result of a contractual agreement between the parties. Nor are they merely a formal recognition by the legislature that a creditor shall have a possessory in-

terest in a debtor's property which is already under the possession and control of the creditor. Mechanics' and materialmen's lien laws purport to create a *legal* interest in real property which exists as a matter of *public record,* and is strictly regulated by *statutory provisions.* The *State* has, through explicit legislation, devised a scheme so unencumbered and uncomplicated that *any one* may file a document in court claiming an interest in another's property, *without regard for the probable merits* of the claim, the result of which is to cloud the owner's title, in most cases without giving him any hint of such a claim. The intent and effect of this scheme is certainly not to leave the parties alone to work out their private affairs. Appellees submit that the involvement of State action in this statutory scheme is beyond any question. These lien laws must therefore answer to the requirements of the due process clause of both the State and Federal constitution.

C. Mechanics' and materialmen's lien laws involve a "significant property interest" and are therefore subject to the requirements of the due process clause of the State and Federal Constitutions.

A second threshold issue involved in applying the due process clause is whether or not the objectionable action constitutes a taking of a "significant property interest" which is deemed worthy of protection. *Fuentes v. Shevin,* supra; *Bodie v. Connecticut,* 401 US 371, 91 S. Ct. 780, 28 L.Ed.2d. 113 (1971). The respective courts in *Barry Properties,* supra, *Connolly Development,* supra, and *Roundhouse Construction,* supra, all concluded that mechanics' and materialmen's liens involve a significant property interest, and therefore must comply with constitutional due process requirements. Again, the California Supreme Court in the *Connolly Development* case, which Appellant cites in support of her Appeal, issued the most cogent statement on

this issue:

> "But although the imposition of a mechanics' lien does not deprive the owner of the interim use of his property, it may severely hamper his ability to sell or encumber that property. Subsequent purchasers whose title will be subject to the lien may be unwilling to purchase a lawsuit with the land; lenders may refuse a loan on property subject to lien claims; the owner may in some cases be forced to pay a possible invalid lien in order to clear title to his property in time for a pending transaction to be consummated.
>
> *A deprivation need not reach the magnitude of a physical seizure of property in order to fall within the compass of the due process clause." Connolly Development, Inc.,* supra, 553 P.2d 643. (Emphasis added)

The same considerations are valid in Oklahoma, since it is well settled that these liens attach to and travel with the property, thereby making the liens the obligation of any person who may purchase the property. 42 O.S. §141 (1971); *Metropolitan Water Company v. Hild,* 415 P.2d 970 (Okl. 1966). As observed by the California court, subsequent purchasers whose title will be subject to the lien will likely be unwilling to purchase a lawsuit with the land. It is therefore quite obvious, as a practical matter, that the effect of such a lien is to cut off the right of the owner to alienate his property freely. One can hardly imagine a more classic case of impinging upon a significant property interest. The most valuable "use" of real property in this day and time is the ability to turn this asset into some form of capital gain or to pledge it as security for raising revenue, i.e. to sell it or mortgage it for economic benefit. The liens in question here prevent the owner from doing either, and thereby deprive him of this valuable "use" of his property. In order to accomplish either objective, with a lien pending against his property, the owner must post a cash bond in Court to secure the lienor's

claim. Surely Appellant does not contend that this taking of cash from the owner's pocket is not a serious and substantial deprivation of a significant property interest.

In discussing the *Connolly Development* case, supra, and the case of *Spielman-Fond, Inc. v. Hanson's, Inc.* 379 F. Supp 997 (D. Ariz. 1973) (three-judge court), *aff'd per curiam mem,* 417 US 901, 94 S. Ct. 2596, 41 L.Ed. 2d 208 (1974), cited on page 1 of Appellant's Brief in Chief, an important distinction should be made in the reasoning processes and conclusions of these respective courts. In the *Connolly* case, the California Supreme Court held that the lien statutes under question involved (1) State action, and (2) a significant property interest, and then accordingly dealt with the substantive question of whether or not those statutes satisfied constitutional due process requirements. In deciding that question, the court engaged in the traditional balancing of competing interests, and found that because the effect of mechanics' and materialmen's liens was "de minimis" insofar as the interest of the property owner was concerned, vis-a-vis the interest of the contractor who had performed work upon the property, the statutes under question did not violate the constitutional rights of the property owner. On the other hand, the U.S. District Court in the *Spielman-Fond* case did not reach the substantive question of due process because it answered the threshold question of whether or not a significant property interest was involved in the negative. Appellees will deal with the conclusion reached by the California Supreme Court in a separate subproposition. It is important to deal with the *Spielman-Fond* decision at this point, however, because Appellant, and several courts facing this issue, have relied heavily upon that decision for the proposition that mechanics' and materialmen's lien laws are not unconstitutional. Of course, that decision, as Appellees have pointed out,

does not support such a proposition since the Federal District Court in Arizona avoided the issue by holding that a significant property interest was not involved, and therefore the due process clause did not come into play.

The three-judge court for the District of Arizona reasoned that "the liens do nothing more than impinge upon economic interests of the property owner," since they do not deprive the owner of possession pending a hearing on the matter. 379 F. Supp. 999. It is obvious that the Court completely ignored all practical considerations which the filing of a lien such as the ones in question here bring to mind. While there may be no legal impediment to selling property to which a materialmen's lien has attached, there can be little doubt but that no attorney examining title for such property could or would advise his client that the title was marketable and free from defects. In the absence of a legal opinion clearing the title to such property, it matters little that the property could "legally" be sold. No informed purchaser or lender would undertake to purchase or make loans on any property against the advice of counsel.

The distinction suggested by the three judge Court between a "non-significant" property interest which merely impinges upon the economic interests of the property owner, on the one hand, and the "significant" property interests which deserve protection under the Fourteenth Amendment, on the other hand, is one of degree. The Supreme Court has often stated, rather forcefully it is submitted, that the application of the due process clause is not made to depend upon the degree of deprivation.

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. *While*

> *the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." Fuentes v. Shevin,* 407 U.S. 67, 86 (1972). (Emphasis added).

In addition to the respective courts in the *Barry Properties* case, supra, *Roundhouse Construction* case, supra, and the *Connolly Development* case, supra, an impressive number of three-judge District Courts have held that temporary or non-possessory real estate liens such as those created by pre-judgment attachment laws (which are closely akin to those created by mechanics' and materialmen's lien laws) do in fact constitute a taking of a significant property interest worthy of protection under the due process clause of the United States Constitution. See e.g., *Terranova v. AVCO Financial Services,* 396 F. Supp. 1402 (D. Vt. 1975) (three-judge court); *Hutchinson v. Bank of North Carolina,* 392 F. Supp. 888 (M.D.N.C. 1975) (three-judge court); *Bay State Harness Horse Racing and Breeding Assn. v. PPG Industries, Inc.,* 365 F. Sup. 1299 (D. Mass. 1973) (three-judge court); *Gunter v. Merchants Warren National Bank,* 360 F. Supp. 1085 (D. Me. 1973) (three-judge court); and *Clement v. Four N. State St. Corp.,* 360 F. Supp. 933 (D.N.H. 1973) (three-judge court).

Appellees therefore submit that the conclusion that the mechanics' and materialmen's lien laws do not involve a significant property interest is unrealistic and impractical in light of the very real effect which these liens impose upon a property owner's ability to sell and convey his property, and is, furthermore, contrary to the better reasoned authority holding that non-possessory real estate liens constitute a taking of a significant property interest, within the meaning of the due process clause of the United States Constitution. The issue now before

this Court should and must be decided on the substantive question of whether or not our laws comply with due process requirements, rather than the collateral question of whether or not a significant property interest is at stake, which clearly there is.

D. The summary affirmance by the United States Supreme Court of *Spielman-Fond, Inc. v. Hanson's, Inc.* does not constitute a conclusive and final determination that mechanics' and materialmen's lien laws do not amount to a taking of a significant property interest.

A large number of the cases relied upon by Appellant cite the decision by the U.S. District Court of Arizona in *Spielman-Fond, Inc.*, supra, for the proposition that mechanics' and materialmen's liens do not constitute the taking of a significant property interest. On Appeal to the United States Supreme Court, this decision was summarily affirmed in a percuriam memorandum decision, without any discussion. Many courts have taken this to be a final determination of the issue of the constitutionality of mechanics' and materialmen's lien laws. The real question to be decided, however, is: what precedential value does a summary affirmance by the United States Supreme Court, without opinion, have on lower courts?

As the court points out at *B & P Development v. Walker*, 420 F. Supp. 704, 706 (W. D. Pa. 1976), cited on page 8 of the Appellant's Brief, this question is perhaps best answered by Chief Justice Burger's own pronouncement found at *Fusari v. Steinberg*, 419 U.S. 379, 391, 95 S.Ct. 533, 541, 42 L.Ed. 2d 521, 530 (1975):

> "When we summarily affirm without opinion the judgment of a three-judge District Court, we affirm the judgment *but not necessarily the reasoning by which it was*

> *reached.* An unexplicated summary affirmance settles the issues *for the parties,* and is *not to be read as a renunciation* by this Court of doctrines previously announced in our opinions after full argument." (Emphasis added)

In applying these two precepts enunciated by Chief Justice Burger, the court in *Brookhollow Associates v. J.E. Green, Inc.,* 389 F.Supp. 1322 (D. Conn. 1975), cited on page 8 and 9 of Appellant's Brief, observed in a footnote:

> "The lower court's reasoning may not have been the basis of the Supreme Court summary affirmance, as Chief Justice Burger warned in his recent concurring opinion in *Fusari v. Steinberg, . . . The Court may have reasoned instead that there was interference with a significant property interest but that on balance the state's procedures provided sufficient due process protection."* (Emphasis added) 389 F. Supp. 1327 (n.7)

It cannot be argued, therefore, that summary affirmance by the Supreme Court of *Spielman-Fond* effectively decides the issue of whether or not mechanics' and materialmen's lien laws amount to a taking of a significant property interest. The Supreme Court merely affirmed the result reached by the three-judge District Court in Arizona, and as the *Brook Hollow* Court suggests, the Supreme Court may very well have examined the Arizona statutes, and found them to satisfy due process requirements. There was certainly no intent whatsoever to proclaim that the Oklahoma laws or any other state's laws, do not amount to a taking of a significant property interest.

Indeed, there are substantial differences between the mechanics' lien laws of Arizona, and those of Oklahoma. Unlike the Arizona statutes, the law in Oklahoma prolongs the cloud on the owner's title by affording claimants a longer period of time in which to file a lien statement; in the case of a general contractor, the Oklahoma law does not require that the owner

be notified of any lien filed against his property, unlike the Arizona statutes; the lien claimant in Oklahoma is permitted to continue his lien for one year before he is forced to file suit or relinquish his claim, as opposed to six months in Arizona; and finally, the property owner in Oklahoma may discharge his lien only by posting cash equal to the amount of the claim and a bond for attorney fees and costs, as opposed to filing a bond in the amount of the claim, as provided in Arizona. Such a comparison compels the conclusion that Oklahoma's mechanics' and materialmen's lien laws afford significantly less protection under the due process clause than do the laws of Arizona. The Supreme Court's affirmance of *Spielman-Fond* does not therefore translate into a judicial determination that Oklahoma's laws also pass Constitutional muster, and therefore does not foreclose consideration of this issue on Federal grounds by an Oklahoma Court.

The other important point which appears in the quote by Chief Justice Burger set out above is that a summary affirmance without full opinion does not constitute a renunciation of prior doctrines previously announced after full argument. One such doctrine previously enunciated by the Supreme Court appears in *Fuentes:*

> "Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, *it is not decisive of the basic right to a prior hearing of some kind."* (Emphasis added) *Fuentes v. Shevin,* 407 US 67, 86 (1972)

Not only does *Spielman-Fond* not constitute a renunciation of this principle articulating the importance of this basic right to due process, but the precedential value which some proponents attach to the summary affirmance in *Spielman* is even more

doubtful when one considers a subsequent statement by the Supreme Court issued eight months *after* the affirmance of *Spielman:*

> "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing, Inc. v. Di-Chem,* 419 US 601, 608 (1975).

Furthermore, as the Court in *B & P Development,* supra, proclaims, one possible escape from the holding in *Spielman* might arise from doctrinal changes in *subsequent* opinions of the Supreme Court. Even if it is assumed that *Spielman,* when affirmed by the Supreme Court, stood for the proposition that a non-possessory real estate lien, such as a mechanics' and materialmen's lien, does not constitute a taking of a significant property interest, the vitality of that conclusion is certainly suspect in light of the subsequent statement quoted above in the *North Georgia Finishing* case.

Finally, the courts in *B & P Development,* supra, and in *Bankers Trust Company v. El Paso Precast Company,* 560 P.2d 457 (Colo. 1977), cited on page 9 of Appellant's Brief, rely on the case of *Hicks v. Miranda,* 422 US 332, 95 S.Ct. 2281, 45 L.Ed. 2d 223 (1975) to further support the conclusion that lower courts are bound by summary decisions of the Supreme Court. However, a closer look at *Hicks* quickly reveals that that case is distinguishable from the summary affirmance issued in *Spielman.* In *Hicks,* a three-judge District Court ruled that the California obscenity statute was invalid under the Federal Constitution. In doing so, the three-judge District Court ignored an earlier decision by the United States Supreme Court in a different case involving the *same* California obscenity statute. In the latter case, a State court had upheld the State statute against a Federal Constitutional attack. On appeal, the United States

Supreme Court concluded that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The court affirmed summarily, and dismissed "for want of substantial federal question." In the *Hicks* case, the Supreme Court ruled that it was error for the three-judge District Court to ignore that earlier summary affirmance, since the Supreme Court had already decided that there was no substantial Federal question involved in the validity of the California statute.

It is therefore readily apparent that the language in the *Hicks* case to the effect that such a summary affirmance under those conditions is a disposition on the merits, and that lower courts are bound thereby, has no applicability to the affirmance handed down by the high court in *Spielman*. In the first place, in *Hicks* the three-judge District Court was considering the *identical* statute which the Supreme Court had earlier considered on appeal. In addition, the Supreme Court not only summarily affirmed the earlier decision, but further stated that its reasons were for "lack of substantial federal question." It therefore becomes very clear that the three-judge District Court in *Hicks* reached a result which was in direct opposition to a finding by the United States Supreme Court regarding the viability of a challenge to the California obscenity statute on Federal grounds. Quite obviously, the issue had already been decided by the United States Supreme Court, and any court considering the California obscenity statute thereafter, i.e. the *Hicks* court, should have followed the mandate of the Supreme Court.

None of the "Hicks facts" are present in *Spielman* as it relates to the case at bar. We are not now dealing with the Arizona mechanics' and materialmen's lien laws, but rather those of the State of Oklahoma. Furthermore, the affirmance

by the Supreme Court in *Spielman* was not "for lack of substantial federal question," but merely an affirmance of the *result* reached by the three-judge District Court in Arizona, without approval or adoption of the lower court's reasoning or rationale. Thus, *Hicks v. Miranda,* supra, clearly does not offer any authority for the contention that all lower courts are bound by the Supreme Court's affirmance in *Spielman.* Even assuming, arguendo, that summary affirmance of *Spielman-Fond* forecloses the issue insofar as the Federal Constitution may be concerned, it in no way legally precludes this Court from deciding the issue based on the application of the State Constitution. Thus, Appellee submits that this Court should pay no attention to the Supreme Court's affirmance of *Spielman-Fond.*

E. Mechanics' and materialmen's lien laws have a substantial impact upon the property owner and not merely a "de minimis" effect.

Both the *Connolly Development* case, supra, cited on page 6 of Appellant's Brief, and *Cook v. Carlson,* 364 F. Supp. 24 (S.D. So. Dak. 1973) cited on page 3 of Appellant's Brief, take the position that the deprivation which results from the filing of a mechanics' lien is "de minimis," a conclusion which is tantamount to the conclusion reached by the Court in *Spielman-Fond* that the filing of a mechanics' or materialmen's lien does not constitute a taking of a significant property interest. As stated earlier, this is a position founded upon an impractical and unrealistic view of the effect which such liens have upon the ability of property owners to deal freely with their own property interests.

In *Cook,* the Court rested its conclusion that the effect of materialmen's and mechanics' liens is de minimis on a factor which is clearly absent from the Oklahoma statutory scheme. Under the statutes of South Dakota, the owner can force an ex-

peditious adjudication on the merits *without cost* to him, by simply *demanding* that the lien be foreclosed, whereupon the *lien holder must commence* foreclosure proceedings within *30 days* or forfeit the lien. 364 F.Supp. 27. This provision in the lien laws of South Dakota affords the property owner a significant amount of control over the length of time during which his title remains clouded by a lien, pending the disposition of the lien holder's claim. The property owner in Oklahoma has no such statutory right, but rather must incur the expense of hiring an attorney and filing an action in District Court to adjudicate the merits of the lien claim; or must post a *cash* bond equivalent to the amount of the claim in order to discharge the lien; or must wait for a period of one year for the lien claimant to institute an action to adjudicate the merits of his lien. All three of these alternatives are unacceptable in terms of both time and expense to the property owner, and are substantially more prejudicial to his rights and interests in the property than are the provisions of the South Dakota statutes. It certainly cannot therefore be concluded that the *Cook* Court would quickly find the effect of mechanics' and materialmen's liens under Oklahoma law to be de minimis.

As for *Connolly Development, Inc.*, supra, it should be noted at the outset that it is directly contrary to *Spielman-Fond* in that it holds that the imposition of a lien under mechanics' and materialmen's lien statutes *does* constitute a taking of a significant property interest. The California Court exhibited very little difficulty in reaching this conclusion. It is the final result reached by the California Court, after applying its concept and understanding of due process requirements of the Fourteenth Amendment, which offers support to those who seek to uphold these lien statutes. The result reached in that case, however, is distinguishable from the instant case, and the

reasoning process of the Court in reaching its final decision is furthermore laden with inconsistencies and contradictions.

The California Supreme Court cited *Spielman-Fond,* supra, as authority for the proposition that the U.S. Supreme Court found the lien statutes of the State of Arizona to comply with due process requirement. The Court went on to conclude that the California statutes contained *more* safeguards than the Arizona statutes, and therefore naturally concluded that the California laws also passed constitutional muster. Having already compared Arizona statutes to those of Oklahoma, and having shown that the Oklahoma statutory scheme falls woefully short of the standard of due process protection built into the Arizona statutes, the result reached by California presents no bar to raising the issue in Oklahoma. See *Connolly Development,* supra, 553 P.2d 648.

The California Court furthermore rejected the *North Georgia Finishing* case as having no controlling effect on their decision. The Court found *North Georgia* inapposite because under California mechanics' lien statutes, liens attach only to property in which claimants have an interest, unlike the Georgia statutes where the creditor had no interest in the bank account which was garnished. The California Court also distinguished *North Georgia Finishing* on grounds that California statutes provided for some means of speedy post-lien hearings, not found in the Georgia statutes. Addressing the first suggestion, the Court obviously indulges in a circular reasoning process. Of course, *lien claimants only have a so-called interest in the property by virtue of the statute granting them such a lien, the constitutionality and validity of which statute was the very issue before that court.* A logical thought process does not permit one to assume the conclusion as the first premise in an argument which seeks to sustain that very conclusion.

With respect to the second suggestion that California's Civil Code offers alternative means by which speedy post-lien hearings may be obtained, the dissenting opinion appropriately observes:

> "Even, however, were we to assume that general injunctive or declaratory relief laws furnished the debtor with an alternative to an express hearing, these remedies would be wholly inadequate substitutes for the unqualified right to an early hearing guaranteed by due process principles. First, in order to obtain any immediate relief under these general laws, the debtor is required to hire an attorney, prepare, file and serve a civil complaint, issue and serve summons, obtain and post an injunction bond . . . and cause to be issued and served the requisite restraining order or order to show cause, the latter procedure substantially equivalent to the release-of-garnishment condemned in *North Georgia*. In addition to his attorney's fees, the debtor must pay the filing fees and the premium for the bond." *Connolly Development Co., Inc.*, supra, 553 P.2d 660 (dissenting opinion).

The California Court, in an effort to sustain its position and justify its conclusion, engaged in the traditional, but often vague, balancing process whereby it weighed the competing interests of the property owner and lien claimant. The Court maintained that *Mitchell* required that a determination of due process requirements seek to accommodate these varying interests. The Court left no doubt as to where it was going when it concluded the effect of filing mechanics' liens against the property owner is "de minimis." 553 P.2d 652. *Having already reached the conclusion that such liens did in fact constitute a taking of a significant property interest,* as discussed earlier, the subsequent conclusion that the effect is "de minimis" is a classic contradiction. As observed in the dissenting opinion:

"To the average doctor whose home is usually his prin-

> cipal asset, this constitutes no small cloud on his financial horizon but a serious and real impairment to him, his family and his life savings. There is nothing 'minor' about its impact." *Connolly Development, Inc.*, supra 553 P.2d 661 (dissenting opinion).

In considering the effect on the lien claimant, the Court concluded that the lienor's interest in the property is significant by virtue of his having contributed materials and/or labor to the enhancement of the value of that property. As previously noted, it cannot be argued that the lienor has a *legal* interest in the property in that the statute awarding him a lien is the very issue to be determined. While it may be argued that the fact of his having performed labor or furnished materials gives him an *equitable* interest in the property, such an interest does not justify dispensing with the debtor's due process protection of prior judicial participation and early post-seizure hearing. 553 P.2d 662. Furthermore, in relying on *Mitchell* as authority for giving deference to the interests of the lien claimant, the Court ignores the fact that in *Mitchell* the creditor was given an interest in the property by *consent and agreement* of the debtor at the time the initial sales installment contract was entered into. Such initial agreement to recognize the creditor's interest in the property is a far cry from allowing the creditor, under Oklahoma law, the right to claim an interest in the property *after the fact, without prior notice or hearing.* What is more, the Court recognized that the California Constitution specifically mandated that adequate provisions be enacted by the legislature to protect laborers and materialmen by granting them a lien upon property which they have improved. No such constitutional mandate exists in the State of Oklahoma. Finally, it should be noted that the California Supreme Court split four votes to three in rendering this decision, making the vitality of its conclusion doubtful.

Nowhere is the effect of these liens upon the rights of the property owner more vividly illustrated than in the case at bar. Appellee Outrigger is the owner of certain property located in the City of Tulsa, valued in excess of $4,000,000 as evidenced by the value of the mortgage first taken by Appellee, First National Bank & Trust Company of Tulsa. Since July, 1974 there has been on file in the Court Clerk's office in Tulsa County a lien in the amount of approximately $17,000 filed by Appellant's assignor. Since April, 1975, this $4,000,000 piece of property has been tied up in a law suit predicated on a $17,000 claim, as a result of which the owner has encountered considerable delay and difficulty in finding a willing buyer for the property. Furthermore, the law requires that if the owner wants to discharge this lien pending a final determination of the merits of Appellant's claim, he would have to post $17,000 in *cash* with the Court Clerk, plus a bond to cover attorney's fees and court costs which Appellant might incur as a result of the law suit. As it is, the owner has been put to considerable expense in defending the foreclosure action filed by Appellant. To suggest, as some of the above cited cases do, that the deprivation of the owner's ability to sell or pledge his property, or that the posting of $17,000 *cash* bond, plus additional security to cover court costs and attorney's fees, have a "de minimis" effect on the property owner, or that these impositions do not constitute the taking of a significant property interest, is to deny reality.

The effect on an individual property owner is even more devastating. One need only imagine an owner of a $40,000 homestead against which a $2,000 lien has been filed, for example, in order to see the effect which this type of lien has on the average property owner. Although such an owner is legally free to convey his property, it is unimaginable that he could find a buyer or a lender who would be willing to accept property en-

cumbered by such a lien, which, more importantly, would soon transform itself into a full-fledged lawsuit. If the owner seeks to discharge such a lien so that he might sell the property, he must hire an attorney and incur the time and expense of a lawsuit in order to clear title to his homestead, or else find $2,000 in cash to post with the Court Clerk pending a hearing on the merits, a task which, in today's economy, is beyond the means of the average person. In the meantime, during the pendency of this time consuming litigation, market conditions could change, ultimately rendering the owner's ability to sell or mortgage the property economically unfeasible, even though he might be successful in proving the lien to be without merit.

To look at this problem from another point of view, as a practical matter this statutory scheme has the effect of extorting payments from the property owner before, or in some cases entirely without, the merits of the lienor's claim ever being questioned or adjudicated. When a property owner approaches the final moment in consummating the sale or mortgage of his property, only to find that there are liens on file which threaten to halt the orderly and amicable closing of a business deal reached only after long and arduous negotiations, and he is faced with the choice on the one hand of paying off the claimant in cash, or, on the other hand, of allowing the lien to totally thwart the business agreement which has been reached, the relative benefits and detriments of these two alternatives dictate that he should forego principle and opt for expediency. The prudent and reasonable person would likely conclude that in the long run more would be gained if he simply paid off the $600 or $700 claim for example, as opposed to aborting the closing of a $60,000 or $70,000 sale or mortgage, particularly where there are additional exigencies such as time limitations demanding that the owner complete the sale so he can move from the area,

or that he complete the mortgage so that he can use the loan proceeds to meet some business or personal requirement. As for the luxury of posting a cash bond in order to discharge the lien pending a hearing on the merits, that choice involves additional expense in the way of attorney fees, time, and the cost of litigation. Thus he saves money by simply paying the claim rather than fighting it. Needless to say, these liens have tremendous "nuisance value" which stems solely from the fact that the risk or detriment imposed upon the claimant at the time he files his claim against the owner's property is so significantly less than the burden and hardship imposed upon the property owner after the lien is filed. The practical effect, therefore, has all the appearance of legalized extortion since, at least in the case where the owner has sufficient economic resources, the owner is compelled to pay the claim rather than jeopardize the successful completion of the sale or mortgage of his property.

Appellees submit that these examples clearly illustrate beyond any doubt that the effect of mechanics' and materialmen's lien laws is by no means "de minimis." On the contrary, the effect is substantial, and in some cases obviously devastating, and the property owner deserves and is entitled to the full protection of the due process clause of the State and Federal Constitutions.

F . Mechanics' and materialmen's lien laws do not involve any extraordinary circumstances which justify summary seizure without due process.

The Court in *Cook v. Carlson,* 364 F.Supp. 24, 28 (S.D. So. Dak. 1973), cited on page 3 of Appellant's Brief, suggests that mechanics' and materialmen's lien laws are constitutional because they give rise to extraordinary circumstances justifying the attachment of the lien without prior notice or hearing. The United States Supreme Court has carefully delineated those spe-

cial circumstances which justify postponing notice and opportunity for hearing prior to seizure:

> "Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. **First,** in each case, the seizure has been directly necessary to secure an important *governmental or general public interest.* **Second,** there has been a *special need for very prompt action.* **Third,** the State has kept strict control over its monopoly of legitimate force: the *person initiating the seizure has been a government official* responsible for determining, under the standards of a *narrowly drawn statute,* that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to *collect the internal revenue* of the United States, to meet the needs of a *national war* effort, to protect against the *economic disaster* of a bank failure, and to protect the public from *misbranded drugs* and *contaminated food." Fuentes v. Shevin,* 407 U.S. 67, 90-92 (1972) (emphasis added)

Obviously, the criterion which the Court has laid down in determining whether summary seizure without due process is justified would not apply in the context of mechanics' and materialmen's lien laws. We are not here faced with the prospect of the need for a government official to initiate prompt action to seize certain property in order to protect a governmental or public interest. Very much to the contrary, we are dealing with a *private* party initiating action to seize certain property in order to protect his own *private* interest. Furthermore, the list of examples cited by the Supreme Court in which summary seizure has been justified without due process, as well as the examples cited in *Barry Properties* (353 A.2d 233), and even those examples cited in the *Cook* case (364 F. Supp. 28), illustrate beyond any doubt that the seizure of property interests which results from the filing of mechanics' materialmen's liens is simply not the type of "extraordinary circumstance" in which fun-

damental elements of due process of law may be ignored. In addition to those examples cited in *Fuentes,* supra, extraordinary circumstances have been found in the seizure of a yacht transporting marijuana (*Calero-Toledo v. Pierson Yacht Leasing Company,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974); where a government interest was found in maintaining direct and immediate control over military reservations for national security reasons, thereby justifying summary dismissal of an on-base civilian employee (*Cafeteria and Restaurant Workers' Union v. McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961); where economic necessities of war time require the imposition of rent controls without prior hearing *(Bowles v. Willingham,* 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); and where economic necessities of war time require the imposition of price controls without prior hearing (*Yakus v. U.S.,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944). Thus, it is abundantly clear that the situation involving mechanics' and materialmen's liens is not one which presents a special need for prompt action, nor is it one where public interest is involved. The present situation does not comport with the guidelines laid down by the United States Supreme Court, and therefore any suggestion by the court in *Cook,* supra, or any other case, that "extraordinary circumstances" validate the constitutional shortcuts taken by mechanics' and materialmen's lien laws is totally untenable.

G . The doctrine of lis pendens is totally irrelevant to, and substantially distinguishable from, mechanics' and materialmen's lien laws.

In Proposition II, beginning on page 10 of her Brief, Appellant argues that mechanics' and materialmen's lien laws are somehow protected from constitutional attack because the doctrine of lis pendens, and other related lien laws would, in natural order, also be invalidated by application of the due process

clause. The frivolity of this argument is readily apparent, and hardly needs any discussion. It is no answer, of course, to suggest that a law or a doctrine should be impervious to constitutional examination because of the far reaching affects which such an examination might have on other related laws or doctrines. The Constitution, whether State or Federal, was certainly not written with this type of "safety in numbers" rationale. Rather, each and every doctrine, law and judicial decision must stand independently, and withstand constitutional scrutiny because this chain of law and reason will be no stronger than its weakest link.

The court in *Cook v. Carlson,* supra, relied on the doctrine of lis pendens to support its decision to uphold South Dakota's mechanics' and materialmen's lien laws. When the analogy between the doctrine of lis pendens and the materialmen's and mechanics' lien laws is considered in any depth whatsoever, it is quickly seen that the two legal concepts are distinguishable in significant aspects. It should first be noted, as pointed out by the *Cook* Court, that the statute in South Dakota authorizing lis pendens notice *refers specifically* to the notice of mechanic's lien as a substitute for lis pendens notice in the applicable situation. 364 F. Supp. 27. The doctrine of lis pendens is codified in Oklahoma at 12 O.S. §180 (1971). There is absolutely no equivalent reference in the Oklahoma statute which manifests any such relationship between lis pendens and mechanic's liens.

More importantly, however, the two legal concepts are distinguishable on the crucial aspects of due process. By reason of the lis pendens statute, 12 O.S. §180 (1971), "the claim or charge impressed upon certain property by the filing of a lawsuit concerning said property is in law as effective against subsequent purchasers as though the judgment subsequently rendered was operative at the time of the filng of such petition, because

by the terms of the statute, such purchasers take subject thereto." *Lett v. West,* 158 P.2d 1010, 1012 (Okla. 1945). By the very terms of the statute, the doctrine imparts notice to all the world of the plaintiff's claim against the property from the date of the filing of the petition *only if* summons is served upon the defendant property owner within 60 days after the petition is filed; otherwise the doctrine does not prevail until the date summons is actually served. 12 O.S. §180 (1971); *Thompson v. General Outdoor Advertising Company,* 151 P.2d 379 (Okla. 1944). It becomes immediately obvious, therefore, that the property owner, as the named defendant in such lawsuit, acquires *actual* notice that his title has been clouded by virtue of the service of summons and a copy of the petition stating facts constituting a claim against his property. Not only does the property owner receive actual, and almost immediate, notice of the claim against his property, but by answering such petition, and by exercising all the rights and remedies afforded defendants under the law, the property owner may invoke judicial scrutiny at the very earliest stage in order to protect himself against frivolous and prolonged litigation restricting his right to freely alienate his property. The defendant property owner has at his disposal all the various devices contained in the code of civil procedure necessary to test at the earliest possible moment the sufficiency of the claim against his property, e.g. motions attacking jurisdiction, demurrers, motions for judgment on the pleadings, motions for summary judgment, etc. Thus, although the property owner under the doctrine of lis pendens does not receive prior notice or a prior opportunity to be heard on the probable merits of the claim against his property, he *does* in fact receive the *alternative guarantees of due process* in the form of *actual and immediate notice* of a claim pending against his property, and a *prompt post-seizure hearing,* involving *judicial participation,* regarding the probable merits of said claim.

Under the mechanics' and materialmen's lien laws of Oklahoma, a lien claimant is not obligated to furnish the property owner with actual notice of the lien which is being impressed upon his property, nor is the property owner guaranteed a prompt post-seizure hearing, or any hearing at all, on the probable merits of the claim until such time as the lien holder files suit to foreclose his lien.

The two legal concepts are furthermore significantly distinguishable by virtue of the time at which the lien or interest attaches in either case. Under the doctrine of lis pendens, as noted above, the so-called lien, or charge upon the property is imposed as of the time the plaintiff files suit concerning said property. Only then does it become notice to all subsequent purchasers that there is a claim pending against subject property. The doctrine has no effect whatsoever as to any rights, title or interests which were transferred or conveyed prior to the time the petition is filed. This is in stark contrast to the time at which the property interest attaches in the case of one claiming under the mechanics' and materialmen's lien statutes. The claim of such a lien holder becomes a charge upon the property long *before suit* is ever filed against the property owner. Indeed, such a claim becomes a charge on the property *not* even at the time the *lien is filed,* but rather is said to *attach* to the property as of the date on which said claimant *first furnished labor and/or materials* to the subject property. *American-First Title and Trust Company v. Ewing,* 403 P.2d 488 (Okla. 1965). Thus, the lien claimant, by relating the time of attachment of his lien back to the date on which materials were first provided, or labor first performed, can elevate the priority of his lien above the interests of any persons which were acquired during the interim when the lien holder's claim upon the property was clearly *not* a matter of public record. The lien claimant therefore occupies a preferred

position, and enjoys superior rights vis-a-vis a party claiming under the doctrine of lis pendens. The two legal doctrines are therefore clearly not equivalent by any standard. The scheme whereby a mechanics' and materialmen's lien claimant may acquire priority over persons whose claims were filed *before* the mechanics' and materialmen's lien statement became a matter of public record is extremely more offensive to notions of fair play and substantial justice than is the scheme under the doctrine of lis pendens whereby a party acquires an interest only *after* having filed suit against the property owner, thereby giving constructive notice of his claim to the whole world.

In *Bankers Trust v. El Paso Pre Cast Co.*, 560 P.2d. 457 (Colo. 1977), cited at page 9 of Appellant's Brief, the Court deals with this assertion that one acquiring an interest, in this case a mortgagee, between the time work is first performed on the property and the time when a lien statement is filed of record, is also deprived of due process of law through lack of notice. The Court's reasoning is simplistic, however. The Colorado Court suggests that the mortgagee cannot be made to lose his interest or priority until *after* notice and a hearing following the filing of a lien, i.e. and action to foreclose the mechanic's or materialman's lien. This answer would be unassailable, of course, if the interest of the lien claimant were made to attach as of the time of the judgment in such a foreclosure proceeding, or even as of the time when the action to foreclose is filed, similar to the application of the doctrine of lis pendens. However, the statutory scheme in Colorado, as in Oklahoma, allows the lien claimant's interest to attach as of the time work was first performed, or materials first furnished on the property in question. As a result, if the lien is otherwise properly perfected, in many cases a lien claimant's interest may be accelerated so that it predates any other recorded interest in the property, such as the

mortgage. Quite obviously, notice and hearing at the time of a foreclosure proceeding, which may be two, three or even four years after the commencement of improvements on the property, and/or the filing of any mortgage relative to the property, is of no benefit to the mortgagee when the lien claimant's interest is permitted to attach to the property long prior to the time the mortgagee ever became an interested party, notwithstanding that a search of the public record would have revealed no such adverse claim.

Thus, the mechanic's and materialmen's lien claimant enjoys preferential treatment since no one, mortgagee or otherwise, may ever rely upon the public record to accurately advise himself of any parties who might be claiming an adverse and prior interest in the subject property. Conceivably, a mortgagee may find the public record barren of any indication that there are other claims against the property, and may even inspect the property and ascertain that no visible work has been done, or materials furnished, and in reliance thereon accept a first mortgage on the property, only to find some two or three years later, following a foreclosure proceeding, that a mechanics' and materialmen's lien claimant has a prior interest in the property. Surely the Supreme Court of Colorado does not suggest that under these circumstances the mortgagee is not suffering a significant deprivation of a property interest through lack of due process. Appellees contend that due process requires the result reached by the Maryland court in *Barry Properties, Inc. v. Flick Brothers Roofing Company,* supra, namely that *there can be no existing lien on the property until and unless the claimant prevails either in a suit to enforce the claimed lien or in some other appropriate proceeding providing notice and a hearing, and that until such time, the claimant possesses only a chose in action.*

The Colorado Supreme Court further concludes in the *Bankers Trust* case that to require a full panoply of due process protections before filing a lien statement would impair the notice function which the filing of lien statements provides for the benefit of prospective purchasers. Of course, this conclusion assumes that the mechanics' or materialmen's interest has already attached as of the time materials were first furnished, or labor first performed, and that therefore to engage in the seemingly constitutional formality of due process prior to the filing of a lien statement would unnecessarily delay the notice function served by such statements. The conclusion is valid only if the assumption is permitted to prevail. As Appellees have already contended, and the *Barry Properties* case has held, the rights of lien claimants should not attach to the property until such time as there has been a judicial determination of the validity or propriety of awarding such claimants a legal interest in the real property. It follows, therefore, that there is no need to provide notice to prospective purchasers until such time as the legal interests of such a claimant comes into being. Therefore, to require the full panoply of due process protections before such an adjudication is made does not in any way deprive prospective purchasers, or other interested parties, of their opportunity to apprise themselves of any adverse interests or claims to the property in question.

Whether or not these two legal concepts of lis pendens and mechanics' liens may be equivalent, the alleged constitutionality of the doctrine of lis pendens in no way establishes the constitutional validity of the materialmen's and mechanics' lien statutes. Appellees are aware of no case which has challenged the constitutionality of lis pendens, particularly in light of the recent pronouncements of the Supreme Court, and other State courts, regarding modern-day requirements of constitutional due pro-

cess under the Fourteenth Amendment. It cannot therefore be argued, as Appellant contends, that because the doctrine of lis pendens is still intact, mechanics' and materialmen's lien laws are naturally also unassailable. Each doctrine must stand on its own merits, and it is only the mechanics and materialmen's lien statutes with which we are concerned here. Indeed, Appellees do not hesitate to suggest that the doctrine of lis pendens may well violate the constitutional safeguards of due process. Nor does the doctrine of lis pendens satisfy its constitutional obligations by the mere fact of its antiquity, as Appellant somehow concludes (Appellant's Brief, page 11). Long-standing and even ancient legal doctrines have been struck down by courts in their continuing efforts to give the United States Constitution a construction which a modern-day society and an enlightened citizenry can live with.

Similarly, the other doctrines which Appellant suggests are sacred, such as the attorney's lien and tax lien, are distinguishable from mechanics' and materialmen's liens. To begin with, the tax lien qualifies as one of those "extraordinary circumstances" where summary seizure without due process is justified. Indeed, in the discussion of this subject, *Fuentes,* supra, indicates that summary seizure of property to collect the Internal Revenue of the United States has been examined and approved by the United States Supreme Court. A similar rationale would apply to the interests of the State government in collecting State revenue. As for the attorney's lien, there is a substantial question as to whether or not State action is involved so as to require the application of the due process clause. More importantly, however, the statute in question, 5 O.S. §6 (1971), provides that the lien does not come into being until *notice* is given to the individual against whom the lien is claimed, unlike the liens which are now at issue.

As stated at the outset, however, these other related doctrines have no bearing upon the issue now before this court. It may be they will all be examined in due time. But to contend as Appellant does, that this court must now uphold the constitutionality of mechanics' and materialmen's liens for the reason that these other doctrines would also necessarily fail to pass constitutional muster, is an argument wholly without merit. Accordingly, Appellant's Proposition II presents no bar whatsoever to affirming the ruling by the District Court striking down the mechanics' and materialmen's lien laws of Oklahoma.

H . Mechanics' and materialmen's lien laws deprive the property owner of equal protection under the law.

There is yet another undeniable argument which vividly illustrates the denial of due process inflicted upon innocent parties by the mechanics' and materialmen's lien laws of Oklahoma. It is well understood, of course, that the purpose of the materialmen's lien law is to give to the laborer or contractor some assurance that he will be paid for furnishing labor and/or materials on the building and/or land on which he worked by affording him the security of a lien on that building and/or land. *Melton v. Quality Homes, Inc,* 312 P.2d 476 (Okl. 1957). It is equally accepted that the separate provisons of the Oklahoma statutes allowing prejudgment attachment of real property (12 O.S.A. §1151, et seq.) also serve the purpose of permitting a creditor-plaintiff to seize property and hold that property in order that the property thus seized would be forthcoming to satisfy a judgment, in the event the plaintiff should obtain a judgment on his suit against the debtor-defendant. Cf. *Mount v. Trammel,* 73 Okla. 96, 175 P. 232 (1918). To the extent that both statutory schemes serve the same purpose, and were enacted for the benefit of persons similarly situated, as well as operate against persons similarly situated, i.e. property owners,

these two schemes must afford *equal* consideration to such persons insofar as their rights to due process are concerned. Yet, upon closer examination of the prejudgment attachment statutes, the dominating conclusion is that the defendant property owner under those statutes enjoys infinitely greater protection under due process of law than does the defendant property owner under mechanics' and materialmen's lien statutes.

Prior to the amendments to the attachment statutes in 1976, the scheme by which prejudgment attachment could be accomplished closely resembled the manner in which a laborer or contractor could secure the payment of a debt owed him for work performed or materials furnished, as permitted under the mechanics' and materialmen's lien statutes. One of the grounds on which a writ of attachment could issue, which remains unchanged by amendment, is "when the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay for upon delivery." 12 O.S. §1151 (11) (1971). Likewise, attachment may be obtained when the plaintiff believes that the defendant debtor "is about to convert his property" or "is about to dispose of his property" (§1151 (6) and (8)). Prior to amendment, attachment statutes provided that the Court Clerk could issue an order of attachment upon the filing of an affidavit by the plaintiff stating the nature of the plaintiff's claim, the amount believed due and owing to the plaintiff, and the particular ground upon which attachment was sought (§1152). Unlike mechanics' lien laws, the plaintiff would have to post a bond in twice the amount of his claim in order to protect the defendant from any damages, including attorney's fees, which defendant might sustain by reason of wrongful attachment (§1153). Upon accomplishing these tasks, *the Court Clerk was empowered to issue an order of attachment* directing the sheriff to attach the property, including any real property,

identified in plantiff's petition, and hold such property for satisfaction of any judgment pending the outcome of a hearing on the merits (§§1154-1159). The defendant was permitted to seek redelivery of the property by posting a bond with the Clerk in twice the amount of the appraised value of the property attached, whereupon the sheriff was directed to return the property to the defendant pending final judgment on the merits (§1160). Thus, the scheme previously recognized by Oklahoma statutes is identical to the statutory schemes which the Supreme Court struck down in *North Georgia Finishing* and *Fuentes.*

Astutely recognizing, after the Supreme Court of the United States had made it so perfectly clear, that the Oklahoma attachment statutes lacked any provision for judicial participation, prior notice, or opportunity for prior hearing on the probable merits of the plaintiff's right to possession, the Oklahoma legislature amended Section 1152 with an emergency clause making it effective May 4, 1976. 12 O.S. §1152 (1976) now provides: that an order of attachment shall be issued by the *Judge* of the court in which the action is brought, when the plaintiff files an application stating the nature of his claim, the amount claimed, and the grounds on which attachment is sought; the application is *verified* by the plaintiff, or his attorney; and the plaintiff can further show that *notice* has been issued by the Court Clerk to the defendant advising him that an order of attachment of his property has been requested in the District Court; and no written objection has been filed by the defendant within five days after receipt of the notice. However, if written objection is filed within the time allowed, the court shall set the matter down for a *prompt hearing, with notice* to both parties, wherein plaintiff shall be required to *prove the probable merits* of his claim before the court shall issue an order of attachment. Undoubtedly, §1152 was amended to incorporate the significant

safeguards which the Supreme Court had commanded were absolutely necessary if the Fourteenth Amendment of the United States Constitution was to have any meaning and effect at all, to-wit: judicial participation, prior notice, and prior opportunity to be heard on the probable merits of the plaintiff's right to prejudgment possession of the defendant's property. What is also crystal clear, is that *the attachment statutes now possess safeguards which are totally absent from mechanics' and materialmen's lien statutes,* and consequently, the defendant property owner under the attachment statutes has substantially greater due process protection than the defendant property owner under the lien statutes.

Very simply, what is to be concluded from this analysis is that the property owner under the mechanics' and materialmen's lien statutes is not only made to suffer a denial of procedural due process, but also he is denied equal protection under the law, vis-a-vis other property owners who are similarly situated. It is of course elementary, when applying the equal protection clause of the Fourteenth Amendment of the United States Constitution, that only invidious discrimination, without a rationale basis for distinction, is prohibited. *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344,1 L.Ed. 2d 1485 (1957). In that the purpose of these two creditors' remedies is identical, to-wit: obtaining security for payment of a possible judgment arising out of an action for the non-payment of a contractual obligation; and in that the facts and circumstances which give rise to an action under either statutory scheme are indistinguishable, to-wit: when the debtor (property owner) has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay, Appellees submit that *there is no rational basis for distinction between the property owner who is the subject of one action and the property owner who may be the subject of the other action.*

An analogous situation was considered by the Supreme Court of the United States in *Stanley v. Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972). The question before the Court was the statutory procedure under Illinois law whereby an unwed father is presumed to be unfit to raise his illegitimate children upon their mother's death, and may be deprived of the custody of his children without a hearing as to his fitness, whereas a hearing is extended to all other parents whose custody of their children is challenged. *The Supreme Court held that the statute violated the equal protection clause of the Fourteenth Amendment to the extent that the State had accorded bedrock procedural due process rights to some, but not to all persons similarly situated.* The Court relied in part on its decision in *Bell v. Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971) where it found a scheme to be repugnant to the due process clause because it deprived a driver of his license without reference to the very factor which the state itself deemed fundamental to its statutory scheme, to wit: fault in driving. The Court there held that a State could not, while purporting to be concerned with fault in suspending a drivers license, deprive a citizen of his license without a hearing that would assess fault. In the *Stanley* decision, the Court explained:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials. . . . " *Stanley,* supra, 405 U.S.H 656.

Thus, any suggestion in the case at bar that mechanics' and materialmen's lien claimants have some higher right to a summary seizure of the owner's property without due process of law, than do other persons seeking to secure their claims by imposing liens on the owner's property, is totally untenable. The State cannot dispense with notice, hearing and judicial participation by simply presupposing the validity of the lienor's claim. There can be no presumption that the contractor has in fact performed work, or has delivered materials, or has even enhanced the value of the property against which his lien is filed, and is therefore entitled to an "ex parte" lien. The property owner should therefore not be made to endure this cloud upon his title until such time as these essential issues are determined in a prior hearing, with notice and judicial participation. Appellees submit that according to *Stanley v. Illinois,* supra, legislative schemes cannot provide certain fundamental due process rights to some persons, but deprive those same due process rights to other persons similarly situated, without running afoul of the equal protection clause of the Fourteenth Amendment. Therefore, *all* property owners whose property may be subjected to certain liens or encumbrances for the purpose of securing the claims of other persons asserting some right against the property owner are entitled to receive equal treatment under the due process clause. Property owners who must bear the burdens and liabilities imposed by the mechanics' and materialmen's lien statutes clearly do not receive the same due process considerations as all other property owners who are similarly situated.

Moreover, since these two statutory remedies are virtually without distinction insofar as the creditor-plaintiff may accomplish the result which he seeks to obtain, this Court, by upholding the trial court's decision striking down the mechanics' and materialmen's lien laws, would not prejudice the rights and

interests of lien claimants for the reason that *they could continue to obtain security interests in real property on which they performed work by pursuing their remedies under the attachment laws of the State of Oklahoma,* pursuant to a basic action on the contract. Thus, until such time as the legislature could react by amending the statutes to comply with due process requirements, *prospective lien claimants would not be left unprotected.* Rather, by seeking writs of attachment, they would now merely have to admit and recognize that all property owners, as alleged debtors, are entitled to equal application of the due process clause, as guaranteed by the State and Federal Constitutions.

CONCLUSION

The Supreme Court of the United States has made very explicit what it considers to be the essential requirements which are absolutely necessary in guaranteeing all persons their constitutional rights to due process of law. The teachings of *Snidach, Fuentes, Mitchell* and *North Georgia Finishing* make perfectly lucid the proposition that due process of law means *prior notice* and *prior opportunity to be heard.* In the absence of these provisions, it is imperative that there be *judicial participation* in the issuance of any ex parte order commanding prejudgment seizure of property; a *sworn affidavit* by the lien claimant alleging *specific facts* showing his right to immediate possession; opportunity for prompt *post-seizure hearing* on the probable merits of the creditor's immediate right to possession; sufficient *bond to protect the debtor* against any damages which he might suffer as a result of a wrongful taking of his property; and a means by which the *debtor can regain possession* of his property pending a final hearing on the merits.

When putting Oklahoma's mechanics' and materialmen's

lien statutes to this ultimate test, and following the lead of the State Supreme Courts of Maryland and Connecticut,the conclusion is inescapable that the Oklahoma laws fail in every significant aspect to pass constitutional muster. Not only do these laws fail to provide for some form of prior notice to the property owner, they also neglect to provide for an opportunity to be heard on the probable merits of the lienor's claim prior to the filing of the lien. Similarly, in looking for the alternative guarantees of due process, it must be conceded that the Oklahoma statutes do not require judicial participation at an early, meaningful stage of the process, opportunity for a prompt post-seizure hearing, or that the creditor or claimant post security to protect the property owner against damages in the event of "wrongful attachment."

To contend, as Appellant does, that mechanics' and materialmen's liens, because they involve only a temporary and non-possessory lien, do not amount to a "significant property interest," or otherwise have only a "de minimis" effect on the property owner's right to deal freely with his property, is to ignore fundamental, practical considerations, and indeed the realities of the setting in which real estate transactions transpire. Moreover, the summary affirmance by the United States Supreme Court, without opinion, in *Spielman-Fond* certainly does not foreclose the issue insofar as Oklahoma's laws are concerned. Appellant can furthermore point to no extraordinary circumstances which justify summary seizure in this instance, nor does her comparison of these liens to the doctrine of lis pendens withstand the test of reason and logic. Indeed, it only serves to illustrate more dramatically how these lien laws are repugnant to notions of substantial justice and fair play by calling attention to the fact that these liens are permitted to attach to property even prior to the filing of the lien statement, thereby

placing them ahead of intervening interest who found no evidence of adverse claims in the public record.

And finally, it must be said that the Oklahoma legislature clearly recognized the need for due process of law when it amended Oklahoma's attachment and garnishment statutes immediately following the decision of the Supreme Court in *North Georgia Finishing*. The Legislature, however, completely ignored the mechanics' and materialmen's lien laws, and in so doing, has denied interested parties who are subject to the burdens and liabilities imposed by these laws their right to equal protection, as guaranteed by the Fourteenth Amendment to the United States Constitution. Thus, all other defendant property owners enjoy significantly greater protection under the due process clause than do the defendant property owners in the case of mechanics' and materialmen's liens. Indeed, it is for this reason that in striking down the lien laws, contractors and laborers would not suffer irreparable damage, prejudice or substantial injury for the reason that they have alternative statutory grounds to obtain security for the payment of debts which are rightly due and owing to them by property owners for whom they have performed work and/or furnished materials.

It is for these reasons that Appellees contend that the mechanics' and materialmen's lien laws of the State of Oklahoma violate the due process clause of the State and Federal Constitutions. As the Maryland Court correctly concluded, "there can be no existing lien on property, until and unless the claimant prevails either in the suit to enforce the claimed lien or in some other appropriate proceeding providing notice and a hearing. . . . What the claimant, be he a general contractor or sub-contractor, possesses up to that point in time is a chose in action." Accordingly, Appellees respectfully ask that the decision and Order of the trial court dismissing Appellants' claim on

grounds that Oklahoma's mechanics and materialmen's lien laws are unconstitutional be affirmed by this honorable Court.

Respectfully submitted,
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